

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 520

L. T. BARRINGER AND COMPANY, APPELLANT,

vs.

**THE UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION, ATCHISON, TOPEKA
AND SANTA FE RAILWAY COMPANY, ET AL.**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF TENNESSEE**

FILED NOVEMBER 12, 1942.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 520

L. T. BARRINGER AND COMPANY, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION, ATCHISON, TOPEKA
AND SANTA FE RAILWAY COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF TENNESSEE

INDEX.

	Original	Print
Record from D. C. U. S., Western Tennessee.....	1	1
Complaint	1	1
Appendix "A"—Order of I. C. C. in Docket No. 4981	11	11
Appendix "B"—Report of I. C. C. in Docket No. 4981	13	13
Appendix "C"—Petition of L. T. Barringer & Com- pany for rehearing in Docket No. 4981	34	35
Answer of United States	65	54
Answer of Interstate Commerce Commission	67	56
Motion of The Atchison, Topeka & Santa Fe Ry. Co. and others for leave to intervene	73	60
Notice of motion for intervention	78	64
Order granting motion for intervention	79	65
Intervening answer of The Atchison Topeka & Santa Fe Ry., and others	81	66
Amended complaint	88	71
Order granting leave to file amended complaint	90	72
Reporters transcript	91	72
Findings of fact and conclusions of law	97	78
Opinion, per curiam	106	85
Final decree	108	85
Petition for appeal	109	87
Assignment of errors	111	89

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 22, 1943.

Record from D. C. U. S., Western Tennessee—Continued	Original	Print
Order allowing appeal	136	93
Citation on appeal	137	95
Notice of appeal	139	97
Appeal bond (omitted in printing) ..	148	
Stipulation as to Exhibits	144	97
Præcipe for record	145	99
Clerks certificate (omitted in printing) ..	148	
Plaintiff's Exhibit 1—Petition before Interstate Commerce Commission for suspension of elimination of loading charges on cotton	149	103
Plaintiff's Exhibit 2—Stenographers minutes of proceedings before Interstate Commerce Commission	152	105
Secretary's certificate	152	105
Appearance of counsel	154	106
Colloquy between examiner and counsel	158	
Testimony of J. G. Jay	162	110
W. L. Veale	224	150
Harvey Allen	254	160
M. N. Lallinger	272	181
A. G. Thaman	330	218
T. M. Savary	351	232
W. G. Degelow	356	235
C. B. Bee	365	241
Halsey McGovern	377	249
J. E. Atkins	391	258
Alonzo Bennett	399	263
J. G. Jay (recalled)	406	268
W. L. Veale (recalled)	408	269
Plaintiff's Exhibit No. 3—Affidavit of L. T. Barringer ..	421	279
Defendant's Exhibit 1—Respondents' reply to petition of L. T. Barringer for reconsideration	427	285
Statement of points to be relied upon and designation of parts of record to be printed	440	291
Stipulation as to printing	443	293
Order noting probable jurisdiction	445	294

IN THE
District Court of the United States

WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

L. T. BARRINGER & COMPANY,

Plaintiff,

vs.

**UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISS-
SION,**

Defendants.

Civil Action

File No.

COMPLAINT.

Equitable Relief Sought.

1. The plaintiff, L. T. Barringer and Company, brings this complaint against the Interstate Commerce Commission (hereinafter referred to as the Commission) and the United States of America for the purpose of suspending, enjoining, setting aside, and annulling a certain order, more particularly hereinafter described, issued by the Interstate Commerce Commission (hereinafter referred to as the Commission) on January 29, 1942, in a proceeding before the Commission known as *Investigation & Suspension Docket No. 4981, Loading Cotton in Oklahoma*, said order being

reproduced as Appendix B, on pages 13 to 34, hereof, and being incorporated herein by reference. This action arises under, the United States is made a defendant herein pursuant to, and the jurisdiction of this Court is conferred by, U. S. C., Title 28, Sections 41(28), 43, 44, 45, 45(a), 46, 47, and 48, as hereinafter more fully appears.

2. Plaintiff, E. T. Barringer and Company, is a corporation organized and existing under the laws of the state of Tennessee, with its principal office and place of business at Memphis, Tennessee; it is engaged in the business of buying, selling, and shipping cotton and in the course of that business it makes purchases of cotton at various points in the state of Oklahoma. Plaintiff resells cotton so purchased by it to manufacturers located at various places in the southeastern United States and in the states of North Carolina and South Carolina. Plaintiff purchases such cotton in competition with many other merchants, including merchants who ship cotton purchased by them to ports on the Gulf of Mexico.

3. For many years, interstate common carriers by railroad subject to the Interstate Commerce Act, operating to and from various points in the state of Oklahoma, have maintained in tariffs lawfully published and filed with the Commission rates and charges on cotton as follows: On cotton transported in less than carload quantities from railroad depots and cotton platforms to concentration points certain "float-in" rates, and on cotton transported from said railroad depots and cotton platforms, as well as on cotton transported from said concentration points to destinations throughout the United States, certain carload rates, the application of such latter rates being conditioned on a

shipper tendering to the carrier certain minimum quantities, differing levels of carload rates being conditioned on the shipment of 25,000, 35,000, 50,000 and 65,000 pounds. All of said rates, except to the extent hereinafter noted, cover only the service of transporting the cotton from origin to destination. Under said tariffs transit privileges are provided whereby the cotton moves from railroad depots and cotton platforms in less than carload quantities to concentration points, where it is compressed into bales, from whence said cotton is subsequently reshipped in carload quantities to destinations throughout the United States, and the aggregate charges on these inbound and outbound movements are readjusted through claim channels to the basis of the carload rate from the depot or cotton platform where the cotton first originated to the ultimate destination to which it is consigned upon reshipment from the concentration point. As to cotton transported under said rates and privileges above described, such tariffs further provide that, in the event the cotton is loaded by the railroad at the cotton platform or depot where it first originated, there shall be paid on said cotton, in addition to the line-haul rates as above described, a loading charge of 5.5 cents per square bale and 2.75 cents per round bale. Said loading charge is and has been a separately established charge which covers the service of loading the cotton into cars. Prior to April 21, 1942, said loading charges applied to cotton so loaded by the railroads regardless of the destination to which the cotton might be reshipped in carloads from the concentration point.

4. By tariffs filed to become effective June 11, 1941, (Item 325a of Supplement No. 15 to Agent J. R. Peel's I. C. C. No. 307; Supplement No. 5 to Agent J. R.

Peel's I. C. C. No. 3370), certain railroad carriers operating in Oklahoma, including Atchison, Topeka & Santa Fe Railway, Gulf, Colorado & Santa Fe Railway, Panhandle & Santa Fe Railway, Missouri-Kansas-Texas Railroad, proposed to cancel and eliminate the above-described charge for loading cotton and thereafter to load free of charge cotton tendered to the carrier at its depot or cotton platform at points served by such railroad companies in the state of Oklahoma, but only as to cotton reshipped from concentration stations in carloads to Beaumont, Corpus Christi, Galveston, Houston, Orange, Port Arthur, and Texas City, Texas, and Lake Charles, Louisiana. By said tariffs the railroad carriers parties thereto proposed to continue to demand and collect such loading charges on all cotton loaded by them at depots or cotton platforms and reshipped from concentration points to all other destinations, including points in the southeastern United States and in the states of North Carolina and South Carolina, where are located the manufacturers to whom the plaintiff makes shipments.

5. The plaintiff on May 28, 1941, filed with the Commission its written protest against the change in charges proposed in the tariffs above noted, urging that such change in charges, if made effective, would be in violation of Sections 2 and 3 of the Interstate Commerce Act (U. S. C., Title 49, Secs. 2 and 3), and requested that the Commission suspend the operation of said tariff schedules and enter into an investigation concerning the lawfulness thereof, pursuant to authority conferred upon the Commission by paragraph (7) of Section 15 of the Interstate Commerce Act (U. S. C., Title 49, Sec. 15(7)).

6. Thereupon, the Commission by order of June 10, 1941, which order is reproduced herein as Appendix A

at pages 11 to 12, suspended the operation of said proposed change in charges and instituted an investigation into the lawfulness thereof in *Investigation & Suspension Docket No. 4981*, above-mentioned, naming all railroad carriers which were parties to the above-mentioned tariff schedules as respondents in said proceedings. Said railroad respondents, by appropriate supplements to their tariffs, deferred the effective date of the above-described proposed change in charges until the termination of said proceedings before the Commission.

7. Subsequent to the order of the Commission of June 10, 1941, hearings were duly had in the proceeding instituted thereby, and the parties were heard on brief and in oral argument.

8. On January 29, 1942, Division 3 of the Interstate Commerce Commission entered its report and order in said proceeding, said report and order being reproduced as Appendix B, at pages 13 to 34 hereof. In that report and order, the said Division 3 found that the tariff schedules under suspension were just and reasonable and had not been shown to be otherwise unlawful. Accordingly, Division 3 vacated and set aside the above-mentioned suspension order and discontinued the proceeding as of February 21, 1942.

9. Thereafter, under date of February 18, 1942, the plaintiff filed with the Commission its petition seeking a reconsideration in said proceeding, said petition being reproduced as Appendix C hereto, following page 34. In said petition the plaintiff urged that under the facts and the law Division 3 should have found the proposal to be unlawful and in violation of Sections 2 and 3 of the Interstate Commerce Act, and asked that the report and order of Division 3 be modified accordingly

and that the Commission order a permanent cancellation of the suspended tariff provisions.

10. On February 20, 1942, the Commission modified its order of January 29, 1942, so as to extend the effective date thereof to March 21, 1942. On March 16, 1942, the Commission further modified its order of January 29, 1942, so as to extend the effective date thereof to April 21, 1942.

11. By order of April 13, 1942, the Commission denied the aforesaid petition of the plaintiff for reconsideration in the aforesaid proceeding.

12. On April 21, 1942, the railroad carrier respondents in the proceedings before the Commission made effective the above-described change in their charges for loading cotton as authorized by the said report and order of the Commission.

13. In loading cotton at points in the state of Oklahoma, railroads perform precisely the same service on cotton which is reshipped from concentration points in earloads to the above-named points in Texas and Louisiana, as they perform in loading cotton which is reshipped to points in the southeastern United States and in North Carolina and South Carolina. In each case the cotton is loaded under substantially similar circumstances and conditions, and there is no difference in the cotton which said carriers load free of charge and that for which they continue to demand a charge for loading.

14. In buying and selling cotton, the plaintiff must pay all charges assessed for the loading of such cotton, as well as for the transportation thereof to the selling points, out of the price received by it from the buyer of the cotton, and the price which plaintiff is able

to pay for cotton which it attempts to purchase in Oklahoma is decreased *pro tanto* by the amount of charge which plaintiff is compelled to pay for loading cotton. Since the taking effect of the change in charges which the Commission approved in its aforesaid report and order, this plaintiff is compelled to pay 5.5 cents per bale loading charge for the identical service which the railroad carriers now perform free for plaintiff's competitors who purchase cotton in Oklahoma and ship it to Texas ports on the Gulf of Mexico. By this discrimination plaintiff is handicapped and prejudiced in its business and its competitors are advantaged and preferred; such preference and prejudice will continue so long as the Commission's order of January 29, 1942, is permitted to remain in effect and the railroad carriers are thereby authorized to continue in effect the discriminatory charges resulting from the aforesaid change in their tariffs.

15. The report and order of the Commission of January 29, 1942, is unlawful and void and beyond the power of the Commission to make for the following reasons:

(a) Said report and order are not supported by essential findings of fact;

(b) The findings of fact contained in said report on which the Commission predicated its final conclusion, and said final conclusion are without support in the evidence;

(c) In entering said report and order, the Commission acted arbitrarily and exceeded its statutory powers in giving effect to a supposed difference in the competition met by the railroad carriers with competing motor carriers as between the cotton shipped from Oklahoma to the Texas gulf ports, on the one hand,

and cotton shipped from Oklahoma to the southeastern United States and North Carolina and South Carolina, on the other hand, in its determination of the lawfulness under Section 2 of the Interstate Commerce Act (U. S. C., Title 49, Sec. 2) of the proposal to continue the charge for loading cotton shipped to the Southeast while giving the same service free on cotton shipped to the Texas ports.

(d) In entering said report and order the Commission acted arbitrarily and exceeded its statutory powers in giving effect to a supposed difference in the relative levels of the line-haul freight rates on cotton shipped from Oklahoma to Texas gulf ports, on the one hand, and cotton shipped from Oklahoma to the Southeast and North Carolina and South Carolina, on the other hand, in its determination of the lawfulness under paragraph 1 of Section 3 of the Interstate Commerce Act (U. S. C., Title 49, Sec. 3(1)) of the proposal to continue the charge for loading cotton shipped to the Southeast while giving the same service free on cotton shipped to the Texas ports.

(e) In entering said report and order the Commission acted arbitrarily and exceeded its statutory powers in failing and in refusing to make a specific finding and disposition of the issue tendered by the plaintiff of the alleged violation of Section 2 of the Interstate Commerce Act (U. S. C., Title 49, Sec. 2), and in failing and refusing to find that the proposed change in the tariffs would create a violation of said Section 2.

WHEREFORE, plaintiff prays:

1. That an injunction be entered perpetually enjoining and setting aside the operation and effect of the said order of the Commission of January 29, 1942.

2. That plaintiff have such other and further relief in the premises as the nature of the case shall require and to this Court shall seem proper.

Respectfully submitted

AUVERGNE WILLIAMS,
Exchange Bldg.,
Memphis, Tenn.

ROBERT N. BURCHMORE,
NUEL D. BELNAP,
2106 Field Bldg.,
Chicago, Ill.

Attorneys for the Plaintiff.

WALTER, BURCHMORE & BELNAP,
Of Counsel.

APPENDIX A:

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION,
Division 2, held at its office in Washington, D. C., on
the 10th day of June, A. D. 1941.

INVESTIGATION AND SUSPENSION DOCKET No. 4981

LOADING COTTON IN OKLAHOMA

It appearing, That there have been filed with the Interstate Commerce Commission tariffs containing schedules stating new individual and joint rates and charges, and new individual and joint regulations and practices affecting such rates and charges, to become effective on the 11th day of June, 1941, and later, designated as follows:

J. R. Peel, Agent:

Supplements Nos. 15 and 18 to I. C. C. No. 3307 and MF-I. C. C. No. 36;

Supplements Nos. 5 and 12 to I. C. C. No. 3370 and MF-I. C. C. No. 41;

It is ordered, That the Commission upon complaint, without formal pleading, enter upon a hearing concerning the lawfulness of the rates, charges, regulations and practices stated in the said schedules contained in said tariffs, viz.:

Supplement No. 15 to I. C. C. No. 3307 and MF-I. C. C. No. 36, on page 2 thereof, Item 325-A;

Supplement No. 18 to I. C. C. No. 3307 and MF-I. C. C. No. 36, on page 8 thereof, Item 325-B;

Supplement No. 5 to I. C. C. No. 3370 and MF-I. C. C. No. 41, in full;

Supplement No. 12 to I. C. C. No. 3370 and MF-I. C. C. No. 41, on page 4 thereof, Items 120-A and 121-A.

It further appearing, That said schedules make certain reductions in rates for the transportation of cot-

ton, carloads, in interstate and foreign commerce, and the rights and interests of the public appearing to be injuriously affected thereby, and it being the opinion of the Commission that the effective date of the said schedules contained in said tariffs should be postponed pending said hearing and decision thereon;

It is further ordered, That the operation of the said schedules contained in said tariffs be suspended, and that the use of the rates, charges, regulations and practices therein stated be deferred upon interstate and foreign traffic until the 11th day of January, 1942, unless otherwise ordered by the Commission, and no change shall be made in such rates, charges, regulations and practices during the said period of suspension unless authorized by special permission of the Commission.

It is further ordered, That the rates and charges and the regulations and practices thereby sought to be altered shall not be changed by any subsequent tariff or schedule, until this investigation and suspension proceeding has been disposed of or until the period of suspension and any extension thereof has expired, unless authorized by special permission of the Commission.

And it is further ordered, That a copy of this order be filed with said schedules in the office of the Interstate Commerce Commission, and that copies hereof be forthwith served upon the carriers parties to said schedules and upon J. R. Peel, Agent, and that said carriers parties to said schedules be, and they are hereby made respondents to this proceeding, and that they be duly notified of the time and place of the hearing above ordered.

By the Commission, Division 2.

(Seal.)

W. P. BARTEL,
Secretary.

APPENDIX B.

INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET No. 4981¹

LOADING COTTON IN OKLAHOMA

Submitted October 10, 1941. Decided January 29, 1942.

1. Elimination of the rail carriers' loading charge on cotton originating in Oklahoma on respondents' lines, compressed in transit, and moving from compress point to Texas-Gulf ports and Lake Charles, La., at the carload rate from origin point, found just and reasonable and not shown to be otherwise unlawful.
2. Reestablishment of the loading charge on similar shipments originating in Texas on the St. Louis, San Francisco and Texas Railway and destined to the same points, including New Orleans, La., for export, found just and reasonable, and not shown to be otherwise unlawful.

Charles S. Burg, Wm. E. Davis, R. S. Outlaw, Thomas F. King, H. C. Barron, Harvey Allen and W. L. Veale for respondents in I. & S. 4981.

A. J. Baumann, Luther M. Walter, John S. Burchmore, Nuel D. Belnap, P. H. Johansen; and E. H. Thornton and C. A. Mitchell, representing the New Orleans Joint Traffic Bureau, for protestants in I. & S. 4981.

¹This report also embraces I. & S. Docket No. 4996, *Loading Cotton on St. L. S. F. & T. Railway in Texas.*

Toll R. Ware, M. G. Roberts, Alvin J. Baumann,
and *B. F. Batts* for respondents in I. & S. 4996.

T. M. Savary for The Chicago, Rock Island and
Pacific Railway Company (*Frank O. Lowden, James*
E. Gorman, and Joseph B. Fleming, Trustees).

A. G. Thaman for the Missouri Pacific Railroad Com-
pany (*Guy A. Thompson, Trustee*).

C. B. Bee for the Corporation Commission, State of
Oklahoma.

Haskell Donohoe and *Martin G. White* for United
States Department of Agriculture.

Alonzo Bennett representing the Mississippi Valley
Interior Cotton Compress & Cotton Warehouse Asso-
ciation, an intervener.

REPORT OF THE COMMISSION.

DIVISION 3, COMMISSIONERS MAHAFFIE, MILLER, AND
JOHNSON BY DIVISION 3:

By schedules filed to become effective June 11, 1941,
and later in I. & S. 4981 respondents, The Atchison,
Topeka and Santa Fe Railway Company and
others, proposed to cancel the loading charge on
shipments of cotton, in carloads, from Oklahoma to
Texas-Gulf ports and Lake Charles, La. On protests

I. & S. Docket No. 4981—Sheet 2.
of L. T. Barringer & Company and the New Orleans
Joint Traffic Bureau and others, the operation of the
schedules was postponed until January 11, 1942. Subse-
quently respondents deferred their effective date until
the termination of these proceedings.

By schedules filed to become effective June 28, 1941,
respondent in I. & S. 4996, St. Louis, San Francisco

and Texas Railway proposed to reestablish the loading charge on shipments of cotton, in carloads, originating on this carrier's line in Texas, destined to the same points, including New Orleans, La., for export. On protest of the United States Department of Agriculture and the Texas Cotton Growers' Cooperative Association, operation of the schedules was suspended until January 28, 1942. Subsequently respondents deferred their effective date until the termination of these proceedings. The loading charges in issue, applicable only when the cotton is tendered to the rail carriers at their depots or cotton platforms, are 5.5 cents per square bale and 2.75 cents per round bale, which include authorized increases.

For many years the carriers maintained only l.c.l. or any-quantity rates on cotton originating in the southwest and performed all necessary loading services just as in the case of any other l.c.l. freight. However, some years ago the carriers established a scheme of carload rates on cotton, primarily for the purpose of meeting truck competition. This scheme of rates provides for the gathering of cotton in small quantities from gin points to compresses or concentrating stations and for the reshipment therefrom to ultimate destination in carload lots, subject usually to minima of 50,000 or 65,000 pounds. Under this scheme the through charges are ultimately settled under a transit arrangement on the basis of the carload rates from first origin to final destination. Since the shipper obtains the service on the basis of carload rates substantially below any quantity or l.c.l. rates, the carriers, at the time of the establishment of the carload basis, imposed the obligation of

I. & S. Docket No. 4981—Sheet 3.

loading the cotton at gin origins on the shipper. They further provided that, when carriers loaded the cotton at shipper's request, a charge therefor amounting to 5.5 cents per square bale and 2.75 cents per round bale would be imposed. These charges apply only when the cotton is reshipped from the concentrating points under carload rates, or when shipped under the deferred shipment rule to various gulf ports. At the same time, they do not apply if the shipper elects to have his cotton transported to final destination on the basis of the any-quantity or l.c.l. rates provided by the tariffs.

The issues in I. & S. 4981 will be considered first. The Commission decided *Cotton From and to Points in Southwest and Memphis*, 208 I. C. C. 677, on May 8, 1935, hereinafter referred to as the *Southwestern Cotton case*, which was an investigation instituted upon its own motion into and concerning the lawfulness of rates, rules, regulations, and practices applicable to the transportation of cotton, all-rail, between all points in the Southwest (Texas, Arkansas, Oklahoma, Kansas, Missouri, Louisiana on and west of the Mississippi River, and Memphis, Tenn.) including transportation from points in the Southwest as above defined to Gulf ports, Mobile, Ala., and west, for export or coastwise movement beyond such ports. Finding No. 8 in the above proceeding at page 732 reads in part as follows:

That with respect to southwestern points of origin, on the one hand, and Lake Charles and the Texas ports, on the other hand, the maintenance of an interstate carload rate from any point of origin to any port which is higher for substantially the same distance than the interstate carload rate from the same point of origin to another

port, or from another point of origin to the same port, results and will result in undue prejudice to the cotton traffic upon which such higher level of rates is maintained and to the shippers thereof, and in undue preference of the traffic upon which the lower level is maintained and the shippers thereof.

Subsequent thereto carriers were battling with increased truck competition, particularly from origins within the State of

I. & S. Docket No. 4981—Sheet 4.

Texas to Texas-Gulf ports. Effective October 15, 1939, a tariff item was published applicable on cotton traffic originating within the State of Texas which provided that the rail carriers would load cotton tendered to carriers at origins in Texas at their depots or cotton platforms and would bear the expense of such loading. Division 2 refused to suspend the protested item. The Railroad Commission of Texas granted authority to eliminate the loading charge on cotton, intrastate, effective October 28, 1939. Respondents claim that they are also confronted with motor truck competition and by eliminating the loading charge in Oklahoma they can to some extent meet this competition and at the same time comply with the intended effect of Finding 8 in the *Southwestern Cotton* case. There are differences of opinion among the southwestern rail lines as to whether or not Finding 8 requires the establishment of a rule providing for free loading of cotton in Oklahoma the same as applicable in Texas. This is because the loading of cotton is a terminal service charge, whereas Finding 8 specifically refers to rates. In October 1939 the free loading rule, applicable primarily at Texas origins, was considered from the standpoint of the Texas shippers and we

shall, therefore, deal solely with Oklahoma shipments in the instant proceeding in a like manner since loading charges on shipments from origins in that State are the only ones in issue.

The question of free loading on carload shipments of cotton when tendered at the rail carriers' depots or cotton platforms was docketed with the Southwestern Freight Bureau at St. Louis, Mo., and objection made by several rail lines, particularly those serving Arkansas and Missouri, as well as all cotton interests located at Memphis, Tenn. The proposal failed of approval there and individual lines then gave consideration to the proposition. The Corporation Commission of Oklahoma was alleging prejudice to their shippers, whereupon The Atchison, Topeka

I. & S. Docket No. 4981—Sheet 5.

and Santa Fe Railway Company, Missouri-Kansas-Texas Railroad Company, The Kansas City Southern Railway Company, and the Oklahoma Railway Company instructed their tariff publishing agent to make effective June 11, 1941, a provision for the free loading of cotton originating within the State of Oklahoma, similar to the one in effect interstate and intrastate in Texas. The territorial application as to destinations on traffic originating in Oklahoma, however, is not as large as the rule applicable in Texas, the Oklahoma rule applying only to Lake Charles, La., and the Texas ports.

The system of carload rates on cotton was established by southwestern carriers August 7, 1933, for the purpose of meeting competition of unregulated motor trucks. These so-called carload rates were in the nature of any-quantity rates in that they provided for

the accumulation of small lots of cotton into carload lots. The actual handling of cotton by rail when it moves on less-than-carload or any-quantity rates is substantially the same as the handling in carload lots. To illustrate, cotton moving under any-quantity rates may be handled in the several following methods:

- A—Cotton may originate at so-called "country" origins and move under through billing to ultimate destination without an intermediate stop for transit. This cotton may be either uncompressed or compressed.
- B—Cotton may originate at so-called "country" origins and move to ultimate destination under through billing, being temporarily stopped at an intermediate compress station where it may receive the services afforded by a compress.
- C—Cotton may originate at so-called "country" origins and be consigned to a station at which is located a compress, charges being assessed upon basis of the full local rate or so-called "Transit" rates from origin to such transit station.

Subsequently, and within the time limit authorized by tariff for transit privileges, cotton may be reshipped to its final destination, charges being assessed upon basis of the full local rate from transit point to destination. Upon presentation of

I. & S. Docket No. 4981—Sheet 6.

the inbound freight bill and outbound bill of lading, charges will be readjusted by carriers to the basis of the lawful through rate applicable from origin to destination via the transit station.

- D—Cotton may originate at stations at which compresses are located and when tendered upon the carriers' facilities, either depot or cotton platform, it may be transported in exactly the same fashion as shipments which originate at "country" origins.

Under all of the above methods of handling any quantity shipments, the carriers will perform loading from their facilities, either depot or cotton platform, into the cars, for which they receive no remuneration in addition to the lawful through rate.

Carload rates were designed to apply on shipments which might be tendeged in straight carload or on shipments which were to be assembled with other shipments at compress point or at origins at which compresses are not located, so that under the rules governing the application of carload rates it is possible for cotton to be handled in the following methods:

- A—Cotton may originate at so-called "country" origins and move under through billing to ultimate destination without an intermediate stop for transit; such cotton may be either uncompressed or compressed and shipments may move either as a single carload consignment or as several small consignments on separate bills of lading, pooled by shippers so as to attain the highest possible minimum loading requirement to obtain the benefit of the rate applicable in connection with that particular minimum weight.
- B—Cotton may originate at so-called "country" origins and move to ultimate destination under through billing, being temporarily stopped at an intermediate compress station to afford it services offered by a compress and to permit its consolidation with other shipments so as to attain the highest possible minimum loading requirement to obtain the benefit of the rate applicable in connection with that particular minimum weight. Straight carload shipments originating at "country" origins in an uncompressed condition may likewise be stopped for the same purpose. The above privilege is available on traffic to Gulf Ports, but not to southern or eastern destinations.

I. & S. Docket No. 4981—Sheet 7.

C—Cotton may originate at so-called "country" origins and be consigned to a station at which is located a compress; charges being assessed upon basis of the full local rate or so-called inbound "transit rates" from origin to such transit station. Subsequently and within the time limit authorized by tariff for transit privileges, cotton may be reshipped to its final destination, charges being assessed upon basis of the full local rate from transit point to destination. The inbound movement may be either straight carloads or less than carloads. Upon presentation of the inbound freight bill or freight bills and outbound bill of lading, charges will be readjusted by carriers to the basis of the lawful through rate from origin to destination via the transit station applicable to connection with the minimum weight of the outbound shipment from transit station.

D—Cotton may originate at stations at which compresses are located and when tendered upon carriers' facilities either depot or cotton platform, will be transported in exactly the same fashion as shipments which originate at "country" origins.

For all practical purposes the present transportation of cotton under the so-called carload rates is identical with the transportation of cotton under the any-quantity rates, with the exception that:

A—Carriers perform a loading service at initial origin on all cotton tendered them at their depot or on their cotton platform when shipments are moving under any-quantity rates; whereas when shipments moving under so-called carload rates the cotton must be loaded by the shipper or at his expense. (With the exception of cotton originating in Texas where a free loading rule was established.)

B—Under the any-quantity system of rates, the compress acts as the agent of the carrier on cotton

stopped enroute for transit and the carrier collects, along with its rate, the charge assessed by the compress company; whereas under the carload system of rates the compress is not the agent of carrier and the charges assessed by the compress company must be paid directly to the compress company by the shippers or owners of the cotton.

The trucking of cotton to Texas-Gulf ports became acute in 1938-1939, particularly from Texas origins, as well as from country stations or gins to the compress points, usually some 50 miles distant. In the *Southwestern Cotton case* the Commission stated in part at page 695:

I. & S. Docket No. 4981—Sheet 8.

The establishment of a straight-carload rate in connection with a 25,000-pound minimum would therefore require the use of trucks for assembling service, and most of the railroads concerned are apprehensive, and apparently with good reason, that once the cotton is on a truck it may be carried by the truck all the way to a port, or at least to a railroad junction point from which it could move out over a railroad other than the one along whose line it originated, thus depriving the latter of any haul thereon.

Then followed the free loading rule in Texas, established October 15, 1939. Reductions in through rates for the purpose of more adequately meeting truck competition were made applicable from the Southwest, including Oklahoma, on June 20, 1940, but the charge for loading in carload lots still annoyed the Oklahoma shippers who continued to increase their deliveries to trucks throughout 1940. In twenty-five counties within the State of Oklahoma served by the Santa Fe for the season August 1, 1939 to July 31, 1940, there were

207,863 bales of cotton ginned. For this period there were handled to compress points by the Santa Fe 27,788 bales and through from gin points to an interstate destination, 18,179 bales or a total of 45,937 bales, which is but 22.1 per cent of the bales of cotton ginned. The balance of the cotton—77.9 per cent—was either handled by motor trucks or by other rail carriers. For the season August 1, 1940 to June 30, 1941, which is the latest data available, there were 312,514 bales of cotton ginned in the same counties. The Santa Fe handled to compress stations 47,522 bales, and through from gin points to interstate destinations, 15,352 bales, or a total of 62,847 bales, which is but 20.1 per cent of the bales ginned. The remainder—79.9 per cent—was handled by motor truck or by competing rail carriers.

During the season 1939-1940 there were 22,163 bales of cotton moved by motor truck from compress stations in Oklahoma²

I. & S. Docket No. 4961—Sheet 9.

For the same period and from these same compress points the Santa Fe handled but 21179 bales.

The rule under suspension is restricted as to territorial application because of opposition of other lines. The reason for not providing for the absorption of the loading charge in Oklahoma on traffic destined to the Southeast is that the rates to the Southeast are already lower relatively than they are to the Texas ports. Besides, there is no trucking of cotton from Oklahoma to Memphis or to the Southeast. The average cost for complete loading by the rail carriers would be a fraction less than 4 cents a bale, and this cost where labor

² This figure is incomplete for the reason it does not include data from all compresses, some of whom refused to give any information as to the movement of their cotton.

is hired specifically for that purpose. Under present conditions the expense would be nominal as the loading is accomplished by the local station forces. In the case of a non-agency station, section crews are used. Respondents further point out that when they perform the loading the cars are loaded to their maximum capacity, resulting in decreased operating expense by eliminating car depreciation and switching and other expenses incidental to the handling of cars in the transportation of cotton. In the Southwestern Cotton case at page 691 it is stated:

What the railroads are, or should be, seeking is to engage in the transportation of cotton under an arrangement which will net them the greatest possible revenue out of the depressed rates which the competition compels them to charge.

The competition with trucks in Texas was found to be greater to the Gulf ports than from Oklahoma points to the Gulf ports, but the competition with trucks at the country stations to the compress points is shown to be proportionately keen in both States. Regardless, however, of the fact that the rates to the Southeast are relatively lower than to the Texas-Gulf ports, respondents stand ready to make the same free loading rule applicable from Oklahoma to such southeastern destinations.

I. & S. Docket No. 4981—Sheet 10.

In the Southwestern Cotton case at page 718 it is stated:

It is conceded that the rates to southern mill points from Oklahoma are graded up very slowly as the distance increases, but such gradation is asserted to be necessary in order to prevent the cotton from being trucked to Arkansas compress points or river landings.

A representative of the United States Department of Agriculture, supporting respondents' position, calls attention to the fact that the cotton grower is receiving meager returns per acre which are being augmented by Government payments and, therefore, the instant proceedings are of considerable importance and concern to the cotton growers. The Department's position on the Oklahoma situation is summarized as follows:

Inasmuch as on both interstate and intrastate cotton shipments from Texas points the 5.5 and 2.75 cents loading charges are not applied, it is the view of the Secretary, as stated by his witness at the hearing, that in the general interest of all producers and all parties, shipments of cotton from Oklahoma to the ports should be freed of these charges. There would thereby result, it would seem evident a more healthy situation from the standpoint of producers in that to the same important destinations, namely, to Gulf ports, the Oklahoma producers would have available to them the line-haul rate adjustment previously passed upon by this Commission without the competitive distortions therein that result from the superimposing of so-called "nuisance charges" upon the line-haul adjustment from Oklahoma.

The Missouri Pacific Railway Company and the St. Louis, San Francisco lines jointly protest the free-loading rule for Oklahoma shippers for several reasons. Respondents admit that in order for a shipper to avail himself of free loading it is necessary sometimes to haul the cotton "a block or eight blocks or two or three miles" and then deliver it at the depot or cotton platform of the carrier. These protestants believe that this handling would cost the shipper in excess of 5.5 cents per bale, which factor alone can not be said to be controlling in the procurement of this business by respondents. The St. Louis, San Francisco handled 2,178 bales at its Texas stations in 1939.

I. & S. Docket No. 4981—Sheet 11.

1940 season from origins to compress points. It was shown that in spite of the fact that shippers could have availed themselves of the free loading rule then applicable in Texas, every bale shipped was loaded by the shipper. No conclusions are drawn concerning the above situation, but if the Oklahoma shippers acted similarly it would seem that respondents would benefit by such action. Apparently these protestants feel that it is unlikely that the shippers will avail themselves of the free loading in Oklahoma, but at the same time claim that the free loading of cotton by the carriers amounts to an unnecessary and unwarranted dissipation of revenues and is a burden on interstate commerce.

The rule, as has been stated, provides that before the rail carrier will load cotton free of cost to the shipper, the cotton must be placed on the depot or platform facilities of such carrier. The Missouri Pacific and Frisco Lines aver that this "presents the anomalous situation that a shipper served directly by rail facilities, even though located immediately adjacent to the carrier's depot or perhaps just across the street, and who without question would find it more economical to load his cotton directly into cars from his gin or compress, is required to perform that loading at his own cost and expense, while the shipper of cotton who has no rail facilities may haul it to the carrier's depot and there have the carrier load his cotton without cost to himself. The shipper whose carload freight is thus loaded receives more service than is rendered the shipper who places his goods into the car." This is claimed to result in discrimination. If the shipper adjacent to the carrier's depot finds it more economical

to load his cotton directly into the cars at his own expense, he is not discriminated against by permitting another shipper to haul his cotton to the carrier's depot at his

I. & S. Docket No. 4981—Sheet 12.

own expense. If both shippers place their cotton at the carrier's depot, both will have their cotton loaded by the carrier. If the shipper adjacent to the depot finds it more economical to load directly into the cars than to place it on the depot platform, it would seem that he is in a preferential rather than a prejudicial position.

The suspended rule is claimed by these carrier-protestants also to create a fourth-section departure. Briefly their position is that when respondents perform a free-loading service on carload cotton shipments originating at the gin points or country stations and fail to perform a like service when the cotton originates at the compresses, or to make an allowance in lieu thereof, then the shipper at the compress point in effect pays more for a shorter haul than the shipper from the more distant gin point. But like things are not being compared in the foregoing illustration. The rule clearly provides that the same service will be accorded both shippers whether at the gin point or compress point if both place their cotton upon respondents' loading platforms. Under those conditions the same tariff rate is paid by both shippers. Therefore there is no fourth-section departure and no discrimination.

The Mississippi Valley Interior Cotton Compress & Cotton Warehouse Association stands in the position of a protestant in I. & S. 4981 and an intervener in behalf of respondent in I. & S. 4996. This association comprises cotton compress and warehouse operators in

States bordering the Mississippi River, including the southwestern States of Missouri, Arkansas and Louisiana. At the hearing it was the position of the association that if free loading was to be established on traffic to the Gulf ports from Texas and Oklahoma it should be established on all traffic from all points in the Southwest. Further reflection, however,

I. & S. Docket No. 4981—Sheet 13.

seems to have persuaded this association to take the position that the practice of free loading is unnecessary from any traffic standpoint, ~~and~~ that it would entail waste of revenue and impair the ability of the rail carriers to operate efficiently the carload system of rates. It, therefore, urges that the practice be eliminated rather than extended. This protestant also feels that the free loading rule may spread to the territory east of Oklahoma. In that area the rail carriers generally, even at such important points as Memphis and Little Rock, Ark., do not have their own cotton handling facilities, but use those of the compresses under contract and bond arrangements. Thus, the compress management stands in the position of a limited agent of the carriers for performance of many of the services necessary in the handling of cotton. Under the circumstances it is stated these compress facilities could not be treated as non-carrier property for the purpose of avoiding application of the free loading rule. Since the territory east of Oklahoma is not within the issues before us, it would be premature to pass upon the presumed effects of the free-loading rule or to indicate that it may or may not be extended to other States.

The St. Louis Southwestern Railway lines, hereinafter referred to as the Cotton Belt, contend that the

free-loading privilege should only be accorded less-than-carload shipments of cotton moving into transit points and should not be extended to carload shipments moving from origins direct to final destination. The Cotton Belt also fears that the demand for free loading will spread to other southwestern States, particularly Arkansas and Missouri.

The carrier's transit rules and regulations governing the movement of cotton to transit stations provide that less-carload

I. & S. Docket No. 4981—Sheet 14.

shipments may be transported into transit points without charge over and above the through rate applicable from origin (or transit point if higher) to final destination, from origins within 50 miles of the transit points and at a charge of 3.75 cents per 100 pounds from origins beyond 50 miles, except that if shipment is made in lots of 40 bales or more moving on one bill of lading no charge is made on such shipments when originating within 100 miles from the transit point. These lots of 40 bales or more from beyond the 50-mile limit are considered by the Cotton Belt to be in the nature of carload shipments, and this carrier feels that the loading charges on such shipments should be continued. In effect the position of this carrier is that on all cotton originating within 50 miles of the transit points and less-carload shipments originating any distance from the transit points when tendered at the carrier's depot or cotton platform will be loaded by and at the expense of the carrier. The question as presented is not before us for adjudication. The real issue is whether the free-loading rule as it affects carload shipments from Oklahoma to Lake Charles and Texas-Gulf ports is unlawful. Division 2 refused to

suspend a similar rule in connection with shipments originating in Texas, and from the evidence presented in the instant proceedings it has not been shown that any provisions of the Interstate Commerce Act would be violated if the suspended Oklahoma rule is permitted to become effective. No violations from the effect of the Texas rule have been brought to our attention.

The pertinent facts are these: The carload rates on cotton from Oklahoma to the Gulf ports and the Southeast are conceded by all parties to be below a reasonable maximum level, yet at the same time compensatory. This is affirmed in the *Southwestern Cotton case*. Some carriers feel that they must do

I. & S. Docket No. 4981—Sheet 15.

something to retain the cotton traffic on their lines. They are using the free loading rule to assist them in retaining such traffic and at the same time attempting to derive as much revenue as they can from the admittedly low level of rates now in effect on this traffic.

The main concern of the carrier-protestants is to prevent the spread of the free-loading rule, but we believe there has not been sufficient time to test the feasibility of this rule. Therefore, its adoption or rejection may be left to the discretion of all the carriers. The St. Louis, San Francisco and Texas Railway, respondent in I. & S. 4996, should have the same right to assess the loading charge on shipments of cotton originating on its lines in Texas as some of the Oklahoma carriers have who are not adopting the free-loading rule. The rates from the Texas origins are also upon a depressed level and any of the rail carriers have the right to offset this discrepancy by any legiti-

mate means. Evidently some believe the rule will be helpful while others do not. Some of the carriers in Oklahoma do not desire to waive the loading charge and the same right of choosing one method or the other can not be denied any of the Texas or Oklahoma carriers so long as there is no violation of the act in either State.

In the *Southwestern Cotton* case the Commission at page 724 said:

The practices which may have prevailed in the past with respect to free transit are no criteria in the present circumstances. In the past there was substantially no unregulated competition and the rates were not depressed. If the carriers gave a free service in one instance it was not unreasonable to expect them to give it in another. Now the situation has changed. In the present circumstances it is not only the carriers' right but their duty to conduct their operations in the most economical manner possible, in order to retain the greatest

I. & S. Docket No. 4981—Sheet 16.
net-revenue out of the low competitive rates which they are compelled to charge. The fact that they have provided certain transit services without charge in addition to the transportation rates, in instances where that seems to be good business policy from a competitive standpoint affords no basis for requiring them to assume the additional burden and expense incident to such services where the opportunities for corresponding benefits to them are lacking.

This was said with reference to the circumstances which distinguish the granting of transit in the interior but not at the ports. It applies with equal force to either of the situations presented in the proceedings now before us.

We, therefore, find that the elimination of the rail carriers' loading charge on cotton originating in Okla-

homa on respondents' lines, compressed in transit and moving from compress point to Texas-Gulf ports and Lake Charles, La., at the carload rate from origin point, is just and reasonable and not shown to be otherwise unlawful.

We further find that the re-establishment of the loading charge on shipments of cotton originating in Texas on the St. Louis, San Francisco and Texas Railway Company and destined to the same points, including New Orleans, La., for export, is just and reasonable and not shown to be otherwise unlawful.

An order will be entered vacating the orders of suspension in both I. & S. 4981 and I. & S. 4996 and discontinuing the proceedings.

I. & S. Docket No. 4981—Sheet 17.

JOHNSON, *Commissioner*, dissenting:

I disagree with the views of the majority. In my opinion, cancelation of the loading charges at Oklahoma points by the respondents in I. & S. No. 4981 will result in preference of the Texas gulf ports, Lake Charles, La., and west, and prejudice to New Orleans, La., Memphis, Tenn., and points in the Southeast. Although the report does not indicate that there is compelling truck competition to New Orleans, Memphis, and the Southeast, it does indicate that the largest truck movement in Oklahoma is from country points to the compress points. As it does not appear that trucks are hauling cotton from the compress points to New Orleans, Memphis, and the Southeast, it may be argued that the circumstances and conditions surrounding the transportation to those points are different from those governing the transportation to the Texas gulf ports. However, the truck competition between the country

points and the compress points is the same regardless of the destination of the cotton after compression. This being true, how can it be said that the purchaser of cotton at Memphis, for example, is at no disadvantage? Cotton is purchased at or near Muskogee, Okla., for L. T. Barringer & Company, Memphis, for shipment to Kannapolis, N. C., in competition with those who purchase for shipment to the Texas gulf ports. The cotton purchased for Barringer includes the loading charge, whereas that purchased for movement to the Texas gulf ports will not. It is said that a difference of 5 cents a bale will make or lose a sale.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION,
Division 3, held at its office in Washington, D. C. on
the 29th day of January, A. D. 1942

Investigation and Suspension Docket No. 4981
Loading Cotton in Oklahoma

Investigation and Suspension Docket No. 4996
Loading Cotton on St. L. S. F. & T. Ry. in Texas

It appearing. That by orders dated June 10, 1941, and later, in Investigation and Suspension Docket No. 4981, and by order dated June 27, 1941, in Investigation and Suspension Docket No. 4996, the Commission entered upon a hearing concerning the lawfulness of the rates, charges, regulations, and practices stated in the schedules enumerated and described in said orders, and suspended the operation of said schedules until January 11, 1942, in Investigation and Suspension

Docket No. 4981, and until January 28, 1942, in Investigation and Suspension Docket No. 4996; and that subsequently respondents voluntarily deferred the effective date of these schedules until the termination of these proceedings.

It further appearing, That, by voluntary action of respondents, the effective dates of the schedules in Investigation and Suspension Dockets Nos. 4981 and 4996 were postponed until disposition of these proceedings;

It further appearing, That a full investigation of the matters and things involved has been made, and that said division, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

It is ordered, That the orders heretofore entered in Investigation and Suspension Docket No. 4981 and Investigation and Suspension Docket No. 4996, suspending the operation of the schedules therein be, and they are hereby, vacated and set aside as of February 21st, 1942, and that this proceeding be discontinued.

By the Commission, division 3.

(Seal)

W. P. BARTEL,
Secretary.

[fol. 34]

APPENDIX C TO COMPLAINT

BEFORE THE INTERSTATE COMMERCE COMMISSION

I. & S. Docket 4981

Loading Cotton in Oklahoma

PETITION OF L. T. BARRINGER & COMPANY; PROTESTANT, FOR
RECONSIDERATION

Now comes L. T. Barringer & Company, hereinafter referred to as Barringer, a protestant in the above-entitled proceeding, and respectfully requests that the Commission grant a reconsideration therein for the purpose of entering a report which will correctly state the facts and which will find the proposed schedules to be not justified. In support of its request, it respectfully submits that Division 3 erred in its report of January 29, 1942, in the following particulars:

1. In finding that there is a difference in circumstances and conditions surrounding cotton shipped from Oklahoma to the gulf ports, on the one hand, and cotton shipped from Oklahoma to the southeast and the Carolinas, on the other hand, in the matter of truck competition encountered by the respondents.

[fol. 35] 2. In finding that the line-haul rates on cotton, in carloads, from Oklahoma to the southeast are relatively lower than to the Texas ports.

3. In omitting from the report the facts and reasoning relied upon by Barringer as showing that the proposed schedules would result in violations of Sections 2 and 3(1) of the Act.

4. In finding in substance that differences in competitive conditions excuse an apparent violation of Section 2 of the Act.

5. In failing to find that the proposed schedules have not been justified and are unlawful in violation of Sections 2 and 3(1) of the Act.

The only reference in the report of the majority of Division 3 to Barringer is in a sentence naming Barringer as

one of those who protested the proposed schedules. The report of the majority does not state the grounds of the protest, nor does it state the respects in which Barringer contends that the proposed schedules would result in violations of the Interstate Commerce Act. Nor does the report of the majority make any mention of the evidence offered on behalf of Barringer or of what was said in brief or at the oral argument in support of its protest.

Consequently, it is necessary for us to develop for the information of the Commission what the report of Division 3 failed to develop. In outlining the case on behalf of Barringer, we show that the error in the report is not only one of omission, but that in many respects the report fails to state the facts with accuracy and in other respects actually misstates the facts. Some of these misstatements are of such general and far-reaching effect that, regardless of how the case is ultimately disposed of, a corrected report should be issued so as to eliminate therefrom the loose and unfounded statements, particularly those as to relative rate levels as to which Division 3 erred so grievously.

The direct interest of Barringer in this proceeding is in obtaining a finding which will compel the respondents to treat cotton shipped from Oklahoma to southeastern destinations the same as cotton shipped from Oklahoma to the Texas gulf ports in so far as the services of loading and the charges therefor are concerned. Consequently, this petition is addressed largely to the errors committed by Division 3 which relate to that phase of the case. However, apart from that issue, the report exhibits a serious misconception of the underlying circumstances involved in the case and in the interest of accuracy these are also pointed out.

The Proposed Change

From the beginning of the carload rate adjustment on cotton, southwestern carriers have maintained separately stated charges for the loading of cotton which moves on carload rates. In so doing, the carriers have treated such cotton the same as they treat all other carload commodities. [fol. 37] In this proceeding, The Atchison, Topeka and Santa Fe Railway, Gulf, Colorado and Santa Fe Railway, Panhandle and Santa Fe Railway, the Missouri-Kansas-Texas Railroad, and certain other lines, proposed to eliminate the loading charge on carload cotton at points served

by them in Oklahoma, but only as to shipments destined to ports on the Gulf of Mexico, Lake Charles, Louisiana, and west. The respondents propose to continue the loading charge on cotton transported on carload rates to all other destinations, including the domestic mills in the southeast and the Carolinas, where are located the destinations to which Barringer makes its shipments. This will place Barringer at a competitive disadvantage in buying cotton in Oklahoma in competition with merchants who buy for shipment to the gulf ports, since, as the Commission said, in *Cotton From and To Points in Southwest and Memphis* (1935), 208 I. C. C. 677, 693, hereinafter referred to as the *Southwestern Cotton case*—

“The price paid for cotton in the interior is ordinarily based on the price at a primary market, less the transportation cost of putting it into that market.”

When cotton is loaded by a respondent at an Oklahoma origin, the service is precisely the same on a direct shipment destined to Houston as it is on a direct shipment destined to Columbia, South Carolina and the service is separate and distinct from the line-haul service. The same [fol. 38] thing can be said as to the loading of cotton initially shipped from a gin origin to a compress point from whence the cotton may be forwarded in carload lots under transit to either Houston or the southeast.

The crux of the case, in so far as Barringer is concerned, is in proposing a fee service on carload traffic to its competitors, while compelling it to pay for an identical service rendered on like traffic under identical circumstances and conditions. This difference in treatment is prejudicial and discriminatory on the face of it. It remains to consider whether the discrimination is unjust and the prejudice is undue within the meaning of Sections 2 and 3 of the Interstate Commerce Act.

The Resulting Disadvantage to and Discrimination Against Barringer

The evidence offered on behalf of Barringer for the purpose of showing the direct disadvantage to it which would result from the proposal if made effective, was presented by Mr. J. E. Atkins, a cotton merchant of Fort Smith, Ark., who testified as follows:

J. E. Atkins & Company does a regular cotton merchant's business with a main office located at Fort Smith,

Arkansas. While the firm buys and sells for its own account, most of the cotton handled is purchased for Barringer. Last season the firm handled 35,000 bales of which 8,000 or 9,000 were handled for the account of the firm, and the balance was handled on commission for Barringer. (Atkins, 238-239)

[fol. 39] The firm buys cotton in the Fort Smith and Muskogee territories, including Oklahoma origins on the lines of the M-K-T and Santa Fe. These origins are within a radius of 100 miles of Muskogee. (Atkins, 239)

Of the cotton purchased last year, about 24,000 bales were purchased at gin origins and the balance at compress points. (Atkins, 240)

The competition with other brokers and cotton merchants is very keen. In normal periods, much of that competition is encountered from those who purchase with a view of shipping to gulf ports. (Atkins, 240)

Seventy-five per cent of the cotton purchased at gins is loaded by the railroads, the charge presently assessed for that service being 5.5 cents a bale. That loading charge must be taken into consideration when purchasing the cotton, since in purchasing cotton the broker must figure on landed price at destination. It costs 93 points to land cotton from Muskogee, Oklahoma, to Kannapolis, North Carolina, of which the loading charge represents one point, since a point is equivalent to 5 cents a bale. (Atkins, 241-242)

The cotton purchased at compress points may be either rail cotton or street, that is, truck cotton. The latter is purchased on warehouse receipt. Rail cotton is sometimes purchased on bill of lading and sometimes purchased on warehouse receipt. If purchased on bill of lading, the buyer knows whether it has been loaded by the carrier or not, since both the bill of lading and the expense bill carry [fol. 40] a notation to that effect. When it is indicated that a carrier loaded the cotton, the cost thereof must be taken into consideration in arriving at the landed basis at which the cotton is purchased. (Atkins, 242-243)

If the suspended tariffs go into effect as proposed, a merchant buying cotton for shipment to the gulf ports will have a 5.5 cents a bale advantage against Barringer. The competition is sufficiently keen in the cotton business so that a difference of 5 cents a bale will make or lose a sale. (Atkins, 244)

The Excuse of the Respondents for the Apparent Discrimination

The respondents seek to justify the proposal as not unlawful under Sections 2 and 3 of the Act on two grounds: First, it is said that there is truck competition to the Texas ports which is not encountered in shipping to the southeast, this making for a difference in circumstances and conditions surrounding the service; secondly, it is argued that the carload rates to the southeast are relatively lower than to the Texas ports so that, considering the aggregate transportation charges, the southeastern shipper is not prejudiced. Division 3 accepts both of these contentions as valid in fact. Furthermore, Division 3 apparently considers that the apparent discrimination and prejudice is justified by the facts so found, although there is no discussion in the report of the legal questions presented for determination. [fol. 41] We respectfully submit that the Division was in error in accepting the contentions of the respondents as if they were true in fact, and we further submit that these contentions, if true, do not constitute a legal defense to the discrimination of which we complain.

There Is No Showing Of Substantial Truck Competition From Oklahoma To The Texas Ports

The statements and findings in the majority report of Division 3 relating to the matter of truck competition from Oklahoma origins are limited to the following:

"Respondents claim that they are also confronted with motor truck competition and by eliminating the loading charge in Oklahoma they can to some extent meet this competition and at the same time comply with the intended effect of Finding 8 in the *Southwestern Cotton case*." (Sheet 4)

"Reductions in through rates for the purpose of more adequately meeting truck competition were made applicable from the Southwest, including Oklahoma, on June 20, 1940, but the charge for loading in carload lots still annoyed the Oklahoma shippers who continued to increase their deliveries to trucks throughout 1940. In twenty-five counties within the State of Oklahoma served by the Santa Fe for the season August 1, 1939 to July 31, 1940, there were 207,863 bales of cotton ginned. For this period there were

handled to compress points by the Santa Fe 27,758 bales and through from gin points to an interstate destination, 18,179 bales or a total of 45,937 bales, which is but 22.1 per- [fol. 42] cent of the bales of cotton ginned. The balance of the cotton—77.9 percent—was either handled by motor trucks or by other rail carriers. For the season August 1, 1940 to June 30, 1941, which is the latest data available, there were 312,514 bales of cotton ginned in the same counties. The Santa Fe handled to compress stations 47,522 bales, and through from gin points to interstate destinations, 15,352 bales, or a total of 62,847 bales, which is but 20.1 percent of the bales ginned. The remainder—79.9 percent—was handled by motor truck or by competing rail carriers.

"During the season 1939-1940, there were 22,163 bales of cotton moved by motor truck from compress stations in Oklahoma.² For the same period and from these same compress points the Santa Fe handled but 21,179 bales." (Sheets 8-9).

"Besides, there is no trucking of cotton from Oklahoma to Memphis or to the Southeast." (Sheet 9)

"The competition with trucks in Texas was found to be greater to the Gulf ports than from Oklahoma points to the Gulf ports, but the competition with trucks at the country stations to the compress points is shown to be proportionately keen in both States." (Sheet 9)

"Some carriers feel that they must do something to retain the cotton traffic on their lines. They are using the free loading rule to assist them in retaining such traffic and at the same time attempting to derive as much revenue as they can from the admittedly low level of rates now in effect [fol. 43] on this traffic." (Sheets 14-15)

In the dissenting opinion of Commissioner Johnson, is found the following reference to truck competition:

"Although the report does not indicate that there is compelling truck competition to New Orleans, Memphis, and the Southwest, it does indicate that the largest truck movement in Oklahoma is from country points to the compress

² This figure is incomplete for the reason it does not include date (sic) from all compresses, some of whom refused to give any information as to the movement of their cotton."

points. As it does not appear that trucks are hauling cotton from the compress points to New Orleans, Memphis, and the Southeast, it may be argued that the circumstances and conditions surrounding the transportation to those points are different from those governing the transportation to the Texas gulf ports. However, the truck competition between the country points and the compress points is the same regardless of the destination of the cotton after compression." (Sheet 17)

Before coming to consider what the record actually shows as to truck competition in Oklahoma, it is necessary to describe briefly the various movements which are involved.

After cotton is gathered, it first goes to a gin where it is baled into what is known as a flat bale. Many gins are not served by rail facilities. (Rec. 32) From the gin the flat bales may move direct to destination in carload or l.c.l. lots. This case does not involve the l.c.l. movement and it will not be further considered. The great preponderance of the cotton does not, however, move direct from gin to destination, but rather moves to a nearby compress for compression. This movement may be either by truck or by rail. When by rail, the movement is on concentration or "float-in" rates. When the cotton concentrated by rail is reshipped from the compress in carload quantities, the shipper has refunded to him under transit all, or practically all, of the inbound charges paid.

The movement from the compress is of compressed cotton, either direct to destination or to some intermediate warehousing point, from whence there is a later reshipment direct to destination. This outbound shipment may be by truck. However, it is predominantly by rail. When the outbound movement consists of cotton brought in by rail, the shipper is accorded a transit settlement under which he finally settles with the carrier on the basis of the through carload rate from gin origin to final destination, obtaining a refund of the entire inbound charges paid unless the gin point takes a higher carload rate than the compress point. If the outbound shipment consists of cotton brought to the compress by truck, the shipper pays the carload rate from the compress point.

At the time of the inbound move to a compress, no one has knowledge of where the cotton will ultimately go. After the cotton is compressed and sold, it may move to gulf ports

to be there merchandised for either rail or water movement beyond, the water movement including coastwise service to New England mills. Or the cotton may move via rail routes [fol. 45] to domestic mills in the southeast and the Carolinas. In addition, there is some movement to mattress factories, or mill points, within the southwest.

The proposed free loading is limited to cotton placed on the cotton platforms of the respondents. The respondents do not propose to perform free loading out of compress facilities. (Rec. 31) The loading at the compress is performed by that facility for the account of the shipper and the cost thereof is included within the compress charge. (Rec. 28)

Consequently, for all practical purposes, we may consider the proposed free loading as limited to cotton placed on cotton platforms at gin origins and not at compress points.

The free loading is limited to cotton which finally goes to gulf ports, Lake Charles and west. Carload cotton moving to mattress factories or mills in the southwest, or to the port of New Orleans, or to domestic mills in the southeast and the Carolinas, will not be loaded free.

With this background, we come to consider the evidence. The majority of Division 3 apparently labored under the impression that data as to certain movements set forth in the above quotation, taken from sheets 8 and 9 of the report, established as a fact the existence of substantial competition by truck from Oklahoma to the Texas ports. If so, the evidence was misunderstood, particularly as to any [fol. 46] relevancy which it might have to the issues in this case.

Let us take first the truck movement from gin origins. Witness Jay stated that an investigation had been made of trucking and that from Oklahoma there was not such a large volume trucked to the gulf ports as from Texas, the largest movement being from gin stations to compress points. (Rec. 19) That movement takes the same "float-in" rates by rail, whether the later reshipment is to the Texas gulf ports or is to domestic destinations. (Rec. 48-9) Obviously, trucking from gin origins to compresses does not constitute a dissimilarity of conditions as between shipments to the Texas ports, on the one hand, and shipments to domestic destinations, on the other.

The only statistics as to trucking from gin origins found in the record are on page 33, but the data there shown are not mentioned in the report. At that point, Witness Jay stated that from gin stations served by the Santa Fe in Oklahoma a total of 35,197 bales moved by truck in the 1940-1941 season up to June 30. He further stated that at least 90 per cent of this was trucked to a compress. (Rec. 34) This would leave approximately 3,500 bales trucked from gins to other than compress-point destinations. The witness did not identify what were these other destinations. Whenever queried as to destinations, the witness took refuge in the statement that it had not been possible to determine them, and said that the truck movement was a combined one to gulf ports, to textile mill points in Texas, and to textile mills in Oklahoma, specific mention being made of Sand Springs and McAlester. (Rec. 23)

The fact that respondents do not propose free loading in the case of shipments to mill points in the southwest, strongly suggests that truck competition had little or nothing to do with what is here proposed.

The long quotation above from sheets 8 and 9, except for the first sentence, is copied verbatim from page 9 of the brief for respondents. The facts there stated have little, if any, significance. In the first place, the truck movement identified as such was from compress facilities and not from gin origins. In the second place, the reference to the balance of the cotton not obtained by the Santa Fe, refers to the movement being by "motor trucks or by other rail carriers." Such a statement proves nothing as to the extent of the truck movement. Before any of the figures are accepted for any purpose, it behooves the Commission to examine the record and to determine exactly what they mean.

Take, for example, the figures given for the 1940-41 season, in which it is said that the Santa Fe handled to compress stations 47,522 bales, and through from gin points to interstate destinations 15,352 bales, or a total of 62,847¹ bales, which is but 20.1 per cent of the bales ginned in the twenty-five counties embraced within the study. The "to compress stations" figure refers only to the float-in movement via the Santa Fe. No data are given as to the number [fol. 48] of bales floated in via other lines of railroad. The "through from gin points to an interstate destination"

¹ The correct total is 66,874 bales.

figure refers to direct shipments which did not go to a compress. No data for such direct movements via other lines of railroad are given. The summary of the respondents adopted by Division 3 does not mention the reshipments from compresses to final destinations. That movement via the Santa Fe, in the period mentioned, amounted to 83,098 bales. (Rec. 21) Even if this added, it still falls short of showing that the Santa Fe handled *all* of the cotton out of the twenty-five counties under consideration. However, the fact that it did not handle *all* of the cotton is wholly without significance in the absence of data from the many other railroads serving the same producing section. Manifestly, the study of the movement from the twenty-five counties shows nothing at all as to the extent of the truck competition to the Texas gulf ports or to any other identified destination or group of destinations.

The only specific figure as to truck movement mentioned in the report is that 22,163 bales moved via truck from compress stations in Oklahoma during the 1939-1940 season as compared with 21,179 bales from the same compress points via the Santa Fe.

It should first be noted that the Santa Fe movement was confined entirely to that via rail to the Texas ports (Exhibit 1; Rec. 25), and was limited to four compress points, i. e., Altus, Chickasha, Clinton, and Pauls Valley. (Rec. 22) Exhibit 1 shows that the total rail movement from these four compresses via the Santa Fe in the 1939-1940 season amounted to 28,804 bales.

As to the truck movement used in the comparison, the witness stated that the destinations could not be determined. (Rec. 23)

What the witness did show as to these four stations by way of comparing the season of 1939-40 with the season of 1940-1941, shows very definitely that the Commission was in error in saying, on sheet 8 of the report, that Oklahoma shippers increased their deliveries to trucks throughout 1940. The fact is that from the four compresses under consideration the truck movement fell off from 22,163 bales to 6,691 bales (Rec. 24), whereas the total rail movement via the Santa Fe increased from 28,804 bales to 38,934 bales. (Exhibit 1)

The only other data in the record as to a specific truck movement was given by Witness Jay at page 17 of the record. That evidence, which is not summarized in the brief

for respondents and not stated in the report of Division 3, shows that in the period August 1, 1939, to February 1, 1940, there was trucked from twenty-six counties in Oklahoma to Houston only 10,372 square bales (this including both flat and compressed cotton), and 8,374 round bales. (Rec. 17. See also Exhibit 40) This is a trifling movement when it is noted that the Oklahoma production in the crop year of 1939 amounted to 511,850 bales, and in the crop year 1940 to 764,067 bales. (Exhibit 2) Furthermore, the line-[fol. 50] haul rates on cotton were very substantially reduced² subsequent to the period ending more than two years ago, in which was developed the trifling truck movement to Houston above stated. For all that this record shows, no cotton at all may have been trucked from Oklahoma to the gulf ports in the last two years.

Division 3, on occasion, refers to the free loading in Texas and to the circumstances which induced the carriers to grant the service in that State as if the situation in Oklahoma were comparable therewith. Exhibit 40 shows how far this supposition departs from the fact. That exhibit shows that in the period August 1, 1939, to February 1, 1940, the total flat, compressed, and round bales trucked from Texas to Houston amounted to 565,335 bales, the corresponding movement from Oklahoma amounting to only 18,746 bales.

There is, of course, no trucking of cotton from Texas to southeastern and Carolina mills, any more than there is trucking of cotton from Oklahoma to the same mills. In Texas, however, the free loading is provided on cotton shipped to the southeast, the same as on cotton shipped to the Texas ports. (Rec. 98-99) Consequently, the elimination of the loading charge in Texas was not protested by Barringer. The refusal of the Commission to suspend the charge in Texas, which was protested only by compress interests, does not bear, even indirectly, upon the issues in [fol. 51] this case as raised by the Barringer protest and evidence.

It is only from Oklahoma origins that the respondents propose to treat the two traffics differently.

² These reductions took place on June 20, 1940, and from Oklahoma origins ranged up to 13 cents per hundred pounds. The reductions were provided both to the gulf ports and to the southeast.

In view of the facts above summarized, it is plain that the record is devoid of evidence showing a substantial truck competition from Oklahoma to the Texas ports which differentiates that movement from the movement to the southeast, and it is also plain that there is no similarity as between Oklahoma and Texas as to truck competition from either gin origins or compress points to the port destinations.

The Rates from Oklahoma to the Southeast Are Relatively Higher, Rather Than Lower, Than the Rates from Oklahoma to the Gulf.

At the top of sheet 9 of the report Division 3 states:

"The reason for not providing for the absorption of the loading charge in Oklahoma on traffic destined to the Southeast is that the rates to the Southeast are already lower relatively than they are to the Texas ports."

At the foot of sheet 9 Division 3 makes the direct statement that the rates to the southeast are relatively lower than to the Texas-gulf ports. These statements repeat what is found on page 10 of the brief for respondents which refers to page 51 of the record. In the course of the cross-examination, Witness Jay first admitted that the competition with trucks from gin points to compresses in Oklahoma [fol. 52] was precisely the same in the case of cotton ultimately reshipped to the southeast as in the case of cotton ultimately reshipped to the Texas ports (Rec. 50), and then, being somewhat at a loss for an excuse for treating differently the two traffics, offered as justification for the difference in treatment the categorical statement as to differing rate levels in the words used by Division 3 in its report. (Rec. 51)

Witness Jay offered no evidence by way of rate comparisons to support his statement. Later in the hearing, Witness Veale was called to the stand on rebuttal, although the testimony which he was supposed to rebut, was not identified. Witness Veale did present Exhibits 32 to 39, inclusive (Rec. 255-265), which show that the distances are shorter to the Texas ports than to the southeast, that the carload rates on cotton as named in cents per hundred pounds are substantially higher to the southeast than to the Texas ports, and that the earnings per ton mile and per car

mile are less under the rates to the southeast than under the rates to the Texas ports. Those exhibits fall far short of proving anything as to a relation of rate levels when measured by some common standard.

In fact, when a common standard is used, the rates to the southeast are shown to be relatively higher rather than lower to the Texas ports. In the *Southwestern Cotton* case, *supra*, at page 717, are shown the carload rates in effect in 1935 from Oklahoma City, Oklahoma, to Columbia, S. C., and Galveston-Houston, Texas, these rates being 67 cents, [fol. 53] minimum 50,000 pounds, and 44 cents, minimum 75,000 pounds, respectively. The Commission noted that the rates just mentioned were 59.8 per cent and 61.9 per cent, respectively, of the Docket 17000-3 c.i.t. rates after deducting an 18-cent compress allowance from the latter. In the case cited the Commission held that the existing relation was not unduly prejudicial to the Texas ports, nor unduly preferential of southern mill points.

Exhibit 38 shows that the present rate from Oklahoma City to Columbia is 67 cents, minimum 50,000 pounds, the same as in 1935. The same exhibit shows that to Houston the rate is now 40 cents, minimum 65,000 pounds, which reflects a reduction of 4 cents per hundred pounds in the rate and a reduction of 10,000 pounds in the carload minimum. Using the same yardstick as used by the Commission in the *Southwestern Cotton* case, *supra*, the Oklahoma City-Houston rate of 40 cents is only 56.3 per cent of 71 cents, the latter being the Docket 17000-3 c.i.t. rate from Oklahoma City to Houston-Galveston after deducting the 18-cent compress allowance. As compared therewith, the rate to Columbia remains 59.8 per cent of the same yardstick scale. If Division 3 had tested the rate relation as did the Commission in the *Southwestern Cotton* case, it would not have made the erroneous finding of which we complain.

We can also test this rate relation by using as our yardstick the first-class rates prescribed in the Twenty-first [fol. 54] Supplemental Report of the Commission on further hearing in the *Consolidated Southwestern Cases* (1934), 205 I. C. C. 601. The first-class rate there prescribed for 489 miles, the distance from Oklahoma City to Houston-Galveston, stated at page 717 of the *Southwestern Cotton* case, is \$1.78. The first-class key-point rate from Oklahoma City to Columbia prescribed in the same case

is \$2.80. Using these first-class rates as our yardstick, the 40-cent rate to Houston is the equivalent of Column 22.5, while the 67-cent rate to Columbia is the equivalent of Column 23.9.

Manifestly, Division 3 fell into a serious error which demands correction when it accepted without verification the statement of respondents' witness that the rate level from Oklahoma to the southeast is relatively lower than from Oklahoma to the Gulf. The true fact, as we have shown above, is squarely to the contrary.

The Proposal Is in Violation of Sections 2 and 3 (1) of the Act

It should not require argument to persuade the Commission that the proposed difference in treatment as between cotton shipped to the Gulf and cotton shipped to the southeast and the Carolinas is unjustly discriminatory in violation of Section 2, as well as unduly prejudicial against Barringer in violation of Section 3(1). However, the fact that the majority of Division 3 did not touch upon the legal questions involved, leads us to deal briefly with the matter from the standpoint of the law.

[fol. 55] We should note at the outset that loading in the case of carload traffic is beyond the obligation which a carrier ordinarily assumes. It is a separate and distinct service, apart from line-haul service, and can be included under the line-haul rate only when specific provision therefor is made in the tariffs. Even then, all shippers must be treated equally if unjust discrimination and undue prejudice is to be avoided. Control over the service of loading and the separately stated charge, if any, to be assessed therefor is lodged in the carrier which originates the traffic.

Some things said on sheets 5 to 7 of the report suggest that Division 3 considered the traffic involved as in the category of l.c.l. traffic, where loading by the carrier is commonly included under the line-haul rate. It is true that the float-in service from gin point to compress is similar to an l.c.l. service. The service from compress to destination is, however, a true carload service in every sense of the word and the service is not the same as was rendered under the former any-quantity adjustment. Furthermore, the rates finally paid under the transit arrangements for the combined in-bound and the out-bound service are true carload

rates. They are not, however, "straight-carload rates" in the sense in which the Commission used that term at page 695 of its report in the *Southwestern Cotton* case, from which Division 3 quotes at the top of sheet 8 of its report, and a reading of that report will make plain why that is so. [fol. 56] Be that as it may, we have here a separate and distinct terminal service in connection with a carload adjustment which is to be performed without charge for some shippers, while other shippers will either not get the service, or, if performed by the respondents, such other shippers must pay an additional separately stated charge. Such a proposal is directly contrary to the principles which underlie the decision of the Commission in *Ex Parte 104, Part II, Propriety of Operating Practices-Terminal Services* (1935), 209 I. C. C. 11.

In *I. & S. Docket 4461, Cotton Loading and Unloading in the Southwest* (1938), 229 I. C. C. 649, the respondent carrier proposed to incorporate in its tariff a rule providing that the unloading from cars and/or the loading into cars would be considered a part of drayed service where such drayed service was authorized. Division 4 found the suspended schedules had not been justified, and at page 664 said:

"A service without charge which actually saves a carrier money, as against the only other available method of handling, which service is performed solely at the option of the carrier and which cannot and does not have any influence on the routing of traffic, and therefore will not invite retaliation from other carriers, cannot be condemned as in any respect improper. But free services which are designed to attract traffic to a particular carrier, and which eventually may force other carriers into like free services, are destructive of the carrier's revenue, and do create advantage for shippers in position to use such free services to the disadvantage of others not in position to use them. [fol. 57] Such free services do constitute a burden on interstate commerce."

The proposal there under investigation would have resulted in free loading at only three points on the line of respondent. That, Division 4 said, would result in undue preference of those points to the disadvantage of other points on respondent's line.

In *Constructive and Off-Track Freight Stations* (1929), 156 I. C. C. 205, the Commission had under consideration the practice of carriers serving Manhattan Island, New York, in respect of the use of motor carriers and inland or constructive stations in the receipt and delivery of freight. Under the arrangement being investigated, the carrier bore the cost of the trucking between its terminal and the constructive station, and the shipper the cost of the trucking beyond the constructive station. In the case of the New Haven Railroad, shippers south of 59th street were treated differently from shippers located north thereof and intermediate thereto. At page 228 the Commission said: "This is clearly an unjust discrimination under the principle of *Wight v. United States*, 167 U. S. 512."

In *T. & S. Docket 4191, Pick-up and Delivery in Official Territory* (1936), 218 I. C. C. 441, 482, the Commission said:

"The failure of respondents to provide for the payment of allowances in connection with the Union Inland Freight [fol. 58] Station No. 1 at New York City, in our judgment, would be unduly prejudicial to shippers using that station and unduly preferential of shippers served by other off-track stations in the metropolitan district."

In *Birkett Mills v. D. L. & W. R. R. Co.* (1927), 123 I. C. C. 63, was involved, *inter alia*, a different transit charge on ex-lake than on all-rail traffic. This difference in charges for a separate accessorial service was complained of as causing unjust discrimination in violation of Section 2 of the A. t. Division 4 held that the complaint was well-founded, saying at page 65:

"With respect to unjust discrimination, complainants also rely on the differing transit charges on ex-lake and all-rail traffic. They contend that, as the transit charges are separately established charges for distinct services, they must stand or fall as such. They refer to *Central R. R. Co. v. United States*, 257 U. S. 247, in which it was held that a transit charge is a local charge for which the carrier establishing it is alone responsible. We believe that complainants' position is sound and that, as the differing transit charges are for the same transit services at the same points by the same carriers, unjust discrimination under section 2 of the act exists."

In *I. & S. Docket 3350, Absorption of Loading Charge* (1930), 161 I. C. C. 389, the Midland Valley proposed making an allowance toward the expense of loading petroleum and its products for certain shippers at Tulsa, Oklahoma. Division 4 found the proposal not justified, and in the course of its report said (pp. 391-2):

[fol. 59] "At the present time, it is the duty of shippers to load and unload carload shipments of petroleum and its products. The proposed schedules would result in the assumption of that duty by respondent in a single instance and would provide an allowance only at a competitive point. The existence or absence of competition does not result in different circumstances and conditions within the meaning of section 2, and for this reason the proposed schedules can not be justified. *Wight v. United States*, 167 U. S. 512, 518; *Seaboard Air Line Ry. Co. v. United States*, 254 U. S. 57, 62. If the allowance is made for a transportation service, every refinery that furnishes the same or a similar service is entitled to the allowance. In *Union Pacific R. R. v. Updike Grain Co.*, 222 U. S. 215, 219, 220, the Supreme Court had under consideration a rule of the Union Pacific as to prompt return of cars which permitted elevators on its line to receive an allowance for elevating grain, but deprived elevators on other lines of the allowance, although they rendered a similar service. The rule depriving the other elevators of this allowance was declared unlawful and the court said: 'The carrier can not pay one shipper for transportation service and enforce an arbitrary rule which deprives another of compensation for a similar service.' See *McCormick Warehouse Co. v. Pennsylvania R. Co.*, 148 I. C. C. 299."

In *Gallagher v. Pennsylvania R. Co.* (1929), 160 I. C. C. 563, the Commission, following *McCormick Warehouse Co. v. Pennsylvania R. Co.* (1928), 148 I. C. C. 299, held that the practice of the defendants in making allowances to certain [fol. 60] warehouse companies in connection with the loading and unloading of package freight at Philadelphia, Pa., and refusing to make such allowances to the complaining warehouses, was unjustly discriminatory and unduly prejudicial in violation of Sections 2 and 3 of the Act. The order of the Commission in that case was sustained by the Su-

preme Court in *Merchants Warehouse Company v. United States* (1931), 283 U. S. 501. The Court saying at page 511:

"Section 2 forbids the carrier to discriminate by way of allowances for transportation services given to one, in connection with the delivery of freight at his place of business which it denies to another in like situation."

In *I. & S., Docket 4415, Allowance for Driving Horses at Miles City, Montana* (1938), 227 I. C. C. 387, the Milwaukee Railroad proposed to pay the actual cost, but not in excess of \$3 per carload, of driving horses from a sales yard at Miles, Montana, to its loading pens at that point. The allowance was restricted to horses driven from the sales yard. Division 2 held the proposal not justified and at page 389 said:

"The exigencies of competition, however, do not justify the more favorable treatment which would be accorded shippers of horses using the sales yard. *Wight v. United States*, 167 U. S. 512; *Seaboard Ry. Co. v. United States*, 254 U. S. 57. The fact that the machinery for working out the discrimination may be in a particular tariff form would not afford it sanctity, and an unlawful discrimination sought to be practiced under a tariff is as evil as one practiced contrary to a tariff. *Gallagher v. Pennsylvania R. Co.*, 160 I. C. C. 563."

[fol. 61] Incidentally, the principle of the case last cited suggests that Division 3 was in error in this case in holding that the proposal to provide free loading from a cotton platform and not from a compress facility is lawful.

In concluding its report, Division 3 quotes from page 724 of the report in the *Southwestern Cotton* case, where the Commission held that carriers would not be required to grant a second transit at the port by reason of the fact that they had previously provided such a privilege without charge, the Commission there saying:

"The fact that they have provided certain transit services without charge in addition to the transportation rates, in instances where that seems to be good business policy from a competitive standpoint, affords no basis for requiring them to assume the additional burden and expense incident to such services where the opportunities for corresponding benefits to them are lacking."

After citing the above statement, Division 3 says (Sheet 16):

"This was said with reference to the circumstances which distinguished the granting of transit in the interior but not at the ports. It applies with equal force to either of the situations presented in the proceedings now before us."

The statement just quoted suggests that Division 3 missed the whole point of this case in so far as Barringer is concerned. A carrier may not at its whim treat one shipper [fol. 62] differently than another solely because it believes that its self-interest is served thereby, and we can find nothing in the *Southwestern Cotton* case which so holds. The correct rule was enunciated in *United States v. Illinois C. R. Co.* (1924), 263 U. S. 515, 523-524, where the Supreme Court, speaking through Mr. Justice Brandeis, said:

"The effort of a carrier to obtain more business, and to retain that which it had secured, proceeds from the motive of self-interest, which is recognized as legitimate; and the fact that preferential rates were given only for this purpose relieves the carrier from any charge of favoritism or malice. But preferences may inflict undue prejudice though the carrier's motives in granting them are honest. *Interstate Commerce Commission v. Chicago G. W. R. Co.*, 209 U. S. 108, 122, 52 L. ed. 705, 713, 28 Sup. Ct. Rep. 493. Self-interest of the carrier may not override the requirement of equality in rates."

[fol. 63]

Conclusion

On sheet 9 of the report Division 3 states that the respondents stand ready to make the free loading rule applicable from Oklahoma to southeastern destinations. That is not a correct statement according to the record. Witness Jay stated that he would have no objections to performing free loading service to all destinations, but when inquiry was made as to whether the respondents intended to so extend the rule, the question was objected to. The witness finally responded by saying that he did not know what actually would be done. (Rec. 67-69)

At the oral argument counsel for respondents urged that the conditions were dissimilar and that respondents should not be compelled to treat traffic to the southeast the same

as they treat traffic to the gulf in respect of the matter of free loading. That issue is here and should be decided. The matter should not be left to the whims of the respondents. The Commission should find that the proposed schedules have not been justified.

Even if the respondents file schedules treating the southeast just like they treat the Texas gulf, the Commission should not let the present report stand without correction. It contains serious misstatements, and parties who rely [fol. 64] upon the reports of the Commission are entitled to have those reports state the facts accurately.

Respectfully submitted, Luther M. Walter, John S. Burchmore, Nuel D. Belnap, *Attorneys for L. T. Barringer & Company, Protestant*. Walter, Burchmore & Belnap, *Of Counsel*, 2106 Field Building, Chicago, Illinois.

February 18, 1942.

Certificate of Service

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing a copy thereof, properly addressed, to each party.

Dated at Chicago, Illinois, this 18th day of February, 1942.

Nuel D. Belnap, *Of Counsel*.

[fol. 65] IN UNITED STATES DISTRICT COURT

ANSWER FOR THE UNITED STATES OF AMERICA—Filed June 15, 1942

The defendant the United States of America:

1. Admits the allegations contained in Paragraphs 1, 4, 5, 6, 7, 8, 10, 11 and 12.

2. Admits the allegation of Paragraph 2 that plaintiff is a corporation organized and existing under the laws of the State of Tennessee with its principal office and place of business at Memphis, Tennessee, and is engaged in the business of dealing in cotton; but has no knowledge sufficient to form a belief as to the manner in which the plain-

tiff conducts its business and no knowledge as to the truth or accuracy of the remaining allegations of Paragraph 2, which are accordingly denied.

3. Admits those allegations of Paragraph 3 which are in accord with the statements and findings of fact contained in the Commission's report, attached as Appendix B to the complaint; and denies those allegations inconsistent therewith.

4. Admits the allegation of Paragraph 9 that plaintiff filed with the commission on February 18, 1942 the petition for reconsideration attached as Appendix C to the complaint, but does not admit the truth of the assertions contained in the said petition.

5. Has no knowledge sufficient to form a belief as to the truth or accuracy of the allegations contained in the first two sentences of Paragraph 14, which allegations are accordingly denied; and denies the allegation contained in the third sentence of Paragraph 14.

6. Denies the allegations contained in Paragraphs 13 and 15.

Wherefore, have- fully answered, the defendant United States of America moves that the complaint be dismissed.

(S) S. R. Brittingham, Jr., Special Assistant to the Attorney General, Department of Justice, Washington, D. C. Thurman Arnold, Assistant Attorney General; William McClanahan, United States Attorney.

[fol. 66] I hereby certify that a copy of the foregoing answer was this day mailed to the following persons:

Auvergne Williams, Esq., Exchange Building, Memphis, Tennessee; Robert N. Burchmore, Esq., Nuel D. Belnap, Esq., 2106 Field Building, Chicago, Illinois, Counsel for Plaintiff; Stanley Payne, Esq., Assistant Chief Counsel, Interstate Commerce Commission, Washington, D. C., Counsel for Interstate Commerce Commission.

(S.) S. R. Brittingham, Jr.

June 12, 1942.

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed June 15, 1942

The Interstate Commerce Commission, hereinafter called the Commission, for answer to the complaint herein, respectfully states:

I

The Commission admits that it made the order dated January 29, 1942, referred to in paragraph 1 of the complaint. By schedules filed with the Commission to become effective June 11, 1941, and later, The Atchison, Topeka & Santa Fe Railway Company, Gulf, Colorado & Santa Fe Railway Company, Panhandle & Santa Fe Railway Company, Missouri-Kansas-Texas Railroad Company, Kansas City Southern Railway Company, Oklahoma Railway Company, and Chicago, Rock Island & Pacific Railway Company proposed to cancel the loading charge on shipments of cotton transported at carload rates from points on their lines in Oklahoma to certain Gulf ports, namely, Lake Charles, La., and Beaumont, Corpus Christi, Galveston, Houston, Orange, Port Arthur, and Texas City, Texas. Protests against said schedules were filed with the Commission by L. T. Barringer and Company, plaintiff here, New Orleans Joint Traffic Bureau and others. By order dated June 10, 1941, the Commission suspended the operation of said schedules and instituted an investigation as to their lawfulness. Said investigation was designated I. & S. Docket No. 4981; the above-mentioned carriers were named as respondents therein. By schedules filed with the Commission to become effective June 28, 1941, St. Louis, San Francisco & Texas Railway Company proposed to reestablish the loading charge on shipments of cotton transported at carload rates from points on its line in Texas to the aforesaid Gulf ports and to New Orleans, La., for export. Protests against these schedules were filed by the United States Department of Agriculture and the Texas Cotton Growers Cooperative Association. By order dated June 27, 1941, the Commission suspended the operation of said schedules and instituted an investigation as to their lawfulness, designating said investigation I. & S. Docket No. 4996 and naming said carrier respondent. A copy of the order of suspension and

investigation, dated June 10, 1941, in I. & S. Docket No. 4981 is incorporated in the complaint as Appendix A.

The aforesaid investigations were consolidated and heard on a common record. After a full hearing, at which a large volume of evidence was introduced, the interested parties, including plaintiff herein, filed briefs with the Com-[fol. 68] mission; and, on October 10, 1941, oral argument, participated in by counsel for plaintiff herein, was submitted to the Commission, Division 3.

On January 29, 1942, the Commission, Division 3, entered a report, entitled I. & S. Docket No. 4981, *Loading Cotton in Oklahoma*, (to be reported in 248 I. C. C. 643), which report also embraced I. & S. Docket No. 4996, *Loading Cotton on St. L., S. F. & T. Railway in Texas*, which report includes the Commission's findings of fact, conclusions and decisions in the premises. The Commission's ultimate findings and conclusions were (1) that the elimination of the loading charge on cotton originating in Oklahoma on the lines of respondents in I. & S. No. 4981, compressed in transit, and moving from the compress point to the Gulf ports in question, at the carload rate from origin point, is just and reasonable and not otherwise unlawful; (2) that the reestablishment of the loading charge on shipments of cotton originating in Texas in I. & S. No. 4996 and destined to the same Gulf ports and to New Orleans, La., for export, is just and reasonable, and not otherwise unlawful.

With said report and as part thereof, the Commission entered the aforesaid order of January 29, 1942, which vacates and sets aside the previously entered orders of suspension in I. & S. Dockets Nos. 4981 and 4996 and discontinues the proceedings. A copy of the aforesaid report and order is incorporated in the complaint as Appendix B.

II

The Commission admits, for the purposes of this suit, that plaintiff, L. T. Barringer and Company, is a corporation under the laws of Tennessee. The Commission is without information respecting the other allegations in paragraph 2 of the complaint. It, therefore, denies said allegations.

III

The Commission admits the allegations contained in paragraph 3 of the complaint to the extent that they are

consistent with the statements and findings of fact contained in the aforesaid report of January 29, 1942.

IV

The Commission admits the allegations in paragraphs 4, 5, 6, 7 and 8 of the complaint.

[fol. 69]

V

The Commission admits, as alleged in paragraph 9 of the complaint, that under date of February 18, 1942, the plaintiff filed with the Commission a petition for reconsideration, a copy of which is reproduced as Appendix C to the complaint. The Commission alleges that under date of March 14, 1942, the respondents in I. & S. Docket No. 4981 filed a reply to said petition.

VI

The Commission admits the allegations of paragraph 10 of the complaint.

VII

The Commission admits the allegations of paragraph 11 of the complaint and alleges that the entire Commission, ten Commissioners participating, gave consideration to plaintiff's petition for reconsideration and of the respondents' reply thereto, and, by order of April 13, 1942, denied said petition.

VIII

The Commission admits the allegations of paragraph 12 of the complaint.

IX

The Commission denies the allegations of paragraph 13 of the complaint, and denies that the circumstances and conditions surrounding the transportation of cotton, in carloads, from the Oklahoma points in question to the Gulf ports are substantially similar to those surrounding the transportation from those points to destination points in the Carolinas or other parts of the Southeast.

X

Answering paragraph 14 of the complaint, the Commission admits and alleges that prior to the filing of the aforesaid schedules the rail carriers serving the State of Okla-

Oklahoma assessed a charge when they performed the service of loading shipments of cotton moving at the carload rate from points in Oklahoma to all destinations; that by the schedules in question some of said carriers proposed to cancel said loading charge on shipments to the Texas gulf ports and Lake Charles, La., in order to meet truck competition; that said carriers did not propose by said schedules to cancel said loading charge on shipments to Memphis or to points in the Southeast for the reasons (1) that the rates to the Southeast are already relatively lower than they are to the Texas ports; (2) there is no trucking of cotton from Oklahoma to Memphis or to the Southeast; that after investigation of the lawfulness of the schedules the Commission found that they are just and reasonable and that they [fol. 70] had not been shown to be otherwise unlawful; that is to say, they had not been shown to violate Section 2, forbidding unjust discrimination, or Section 3(1) prohibiting undue preference and undue prejudice, or any other provision of the Interstate Commerce Act. The Commission, therefore, denies the allegations in said paragraph 14 to the effect that plaintiff is subjected to unjust discrimination or undue prejudice or that its competitors are given an undue preference, in violations of Sections 2 and 3(1) of the Interstate Commerce Act. The Commission alleges that the other allegations of said paragraph 14 are irrelevant and immaterial, but, in the event said allegations are deemed to be relevant and material, denies same.

XI

The Commission denies the allegations contained in paragraph 15 of the complaint.

XII

The Commission respectfully refers the court to the text of its report of January 29, 1942, for full, complete, and accurate information concerning the contents thereof. The Commission also respectfully refers the court to its report entitled *Cotton From and To Points in the Southwest and Memphis, Tenn.*, 208 I. C. C. 677.

XIII

The Commission alleges that the record before it in the aforesaid proceeding failed to disclose that plaintiff is a

shipper or consignee of cotton from points in Oklahoma on the lines of respondents in the said proceeding or that plaintiff pays or has paid transportation charges, or loading charges, on cotton shipped from said points. The Commission therefore alleges that plaintiff is without sufficient legal interest in the subject matter of the Commission's order of January 29, 1942, to entitle it to maintain this suit.

The Commission further alleges that its order of January 29, 1942, vacating its previous order of suspension and discontinuing the proceeding, does not deprive plaintiff of any legal right, and that, therefore, plaintiff is without standing to maintain this suit.

All of which matters and things the Commission is ready to aver, maintain, and prove as this Honorable Court shall [fols. 71-72] direct, and hereby prays that said complaint be dismissed.

Interstate Commerce Commission, By (S) J. Stanley Payne, Assistant Chief Counsel; (S.) Daniel W. Knowlton, Chief Counsel, Of Counsel.

Duly sworn to by Charles D. Mahaffie. Jurat omitted in printing.

[fol. 73] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO INTERVENE AS DEFENDANTS—Filed June 22, 1942

To the Judges of the District Court of the United States,
for the Western District of Tennessee; Western Division:

The Atchison, Topeka and Santa Fe Railway Company, Gulf, Colorado and Santa Fe Railway Company, Panhandle and Santa Fe Railway Company, Missouri-Kansas-Texas Railroad Company, and The Kansas City Southern Railway Company, your petitioners, respectfully allege and show as follows:

I

Petitioner, The Atchison, Topeka and Santa Fe Railway Company, is and was at all times hereinafter mentioned, a corporation organized and existing under the laws of the State of Kansas, and is and was engaged in the business of transporting property in interstate commerce, including

the transportation of cotton from points on its lines in Oklahoma to certain Gulf ports, namely, Beaumont, Corpus Christi, Galveston, Houston, Orange, Port Arthur and Texas City, Texas, and Lake Charles, Louisiana.

II

Petitioner, Gulf, Colorado and Santa Fe Railway Company, is and was at all times hereinafter mentioned, a corporation organized and existing under the laws of the State of Texas, and is and was engaged in the business of transporting property in interstate commerce, including the transportation of cotton from points on its lines in Oklahoma to certain Gulf ports, namely, Beaumont, Corpus Christi, Galveston, Houston, Orange, Port Arthur and Texas City, Texas, and Lake Charles, Louisiana.

III

Petitioner, Panhandle and Santa Fe Railway Company, is and was at all times hereinafter mentioned, a corporation organized and existing under the laws of the State of Texas, and is and was engaged in the business of transporting property in interstate commerce, including the transportation of cotton from points on its lines in Oklahoma to certain Gulf ports, namely, Beaumont, Corpus Christi, Galveston, Houston, Orange, Port Arthur and Texas City, Texas, and Lake Charles, Louisiana.

IV

Petitioner, Missouri-Kansas-Texas Railroad Company, is and was at all times hereinafter mentioned, a corporation organized and existing under the laws of the State of Missouri, and is and was engaged in the business of transporting property in interstate commerce, including the transportation of cotton from points on its lines in Oklahoma to certain Gulf ports, namely, Galveston, Houston and Texas City, Texas.

V

Petitioner, The Kansas City Southern Railway Company, is and was at all times hereinafter mentioned, a corporation organized and existing under the laws of the State of Missouri, and is and was engaged in the business of transporting property in interstate commerce, including

the transportation of cotton from points on its lines in Oklahoma to certain Gulf ports, namely, Port Arthur and Beaumont, Texas, and Lake Charles, Louisiana.

VI

The above-entitled cause was commenced in this court by the filing of complaint and the service of process on the United States of America and Interstate Commerce Commission, defendants therein, on or about the 11th day of May, 1942. Defendants, United States of America and Interstate Commerce Commission, filed their answers on or about the 15th day of June, 1942. No further proceedings have been had therein.

VII

Said complaint is brought against the United States of America and the Interstate Commerce Commission for the purpose of suspending and enjoining, setting aside, and annulling a certain order issued by the Interstate Commerce Commission on January 29, 1942, in a proceeding before the Commission known as Investigation & Suspension Docket No. 4981, *Loading Cotton in Oklahoma*, said order being reproduced as Appendix B on pages 13 to 34 of the said complaint, and the jurisdiction of the court is conferred by U. S. C., Title 28, Sections 41(28), 43, 44, 45, 45a, 46, 47, and 48.

VIII

Your petitioners were parties to the proceeding before the Interstate Commerce Commission entitled I. & S. Docket No. 4981, *Loading Cotton in Oklahoma*, as a result of which the aforesaid order of January 29, 1942, was entered, and on that account have a statutory right to intervene in the litigation in the above-entitled cause, as defend-[fol. 76] ants, by virtue of the following quoted provisions of U. S. C., Title 28, Section 45a:

"45a. (Judicial Code, sections 212, 213.) *Special attorneys; participation by Interstate Commerce Commission; intervention.* The Attorney General shall have charge and control of the interests of the Government in the cases specified in section 44 of this title and in the cases and proceedings under sections 20, 43 and 49 of Title 49, in the

district courts, and in the Supreme Court of the United States upon appeal from the district courts. If in his opinion the public interest requires it, he may retain and employ in the name of the United States, within the appropriations from time to time made by the Congress for such purposes, such special attorneys and counselors at law as he may think necessary to assist in the discharge of any of the duties incumbent upon him and his subordinate attorneys; and the Attorney-General shall stipulate with such special attorneys and counsel the amount of their compensation, which shall not be in excess of the sums appropriated therefor by Congress for such purposes, and shall have supervision of their action: *Provided, That* the Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice, and speed the determination of such suits: *Provided further, That* communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof; and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or non-action of the Attorney General therein.

"Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear [fol. 77] and be made parties to the case and be represented before the courts by counsel, under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States."

IX-

Facts showing petitioners' interest in the litigation in the above-entitled cause and the defenses sought to be asserted by them are alleged and set forth in petitioners' proposed intervening answer, copy of which is attached hereto and made a part hereof.

X

Petitioners will suffer loss of traffic and revenue if the aforesaid order of the Commission is perpetually enjoined and set aside, as prayed by plaintiff, and their intervention in the above-entitled cause is therefore necessary for the protection of their interests.

Wherefore, your petitioners pray that this court make an order granting them leave to intervene in the above-entitled cause, as defendants, with leave to file the attached answer therein, and for such other and further relief as to this court seems just.

The Atchison, Topeka and Santa Fe Railway Company, Gulf, Colorado and Santa Fe Railway Company, Panhandle and Santa Fe Railway Company, Missouri-Kansas-Texas Railroad Company, The Kansas City Southern Railway Company, by R. S. Outlaw, Roland J. Lehman, C. S. Burg, W. E. Davis, Clinton W. McKay, Their Attorneys.

June 18, 1942.

[fol. 78] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION FOR INTERVENTION—Filed June 22, 1942

To Attorneys for Plaintiff and Defendants:

Please take notice that on the motion of The Atchison, Topeka and Santa Fe Railway Company, Gulf, Colorado and Santa Fe Railway Company, Panhandle and Santa Fe Railway Company, Missouri-Kansas-Texas Railroad Company, and The Kansas City Southern Railway Company, and their proposed intervening answer, copies of both of which are hereto attached, and on the pleadings in this suit, the undersigned will petition this court, at the Federal

Court House in the City of Memphis, State of Tennessee, on the 29th day of June, 1943, at 9:30 o'clock in the Forenoon, or as soon thereafter as counsel can be heard, for an order permitting the Atchison, Topeka and Santa Fe Railway Company, Gulf, Colorado and Santa Fe Railway Company, Panhandle and Santa Fe Railway Company, Missouri-Kansas-Texas Railroad Company, and The Kansas City Southern Railway Company, petitioners herein, to intervene as defendants in the above-entitled cause, and for such other relief as may be just.

Clinton H. McKay, Attorney for Petitioners, Exchange Building, Memphis, Tennessee.

June 18, 1942.

[fols. 79-80] IN UNITED STATES DISTRICT COURT

ORDER GRANTING MOTION FOR INTERVENTION

Entered June 29, 1942—Marion S. Boyd, Judge

In this cause this day came The Atchison, Topeka and Santa Fe Railway Company, Gulf, Colorado and Santa Fe Railway Company, Panhandle and Santa Fe Railway Company, Missouri-Kansas-Texas Railroad Company and The Kansas City Southern Railway Company by counsel and presented to the Court their motion for leave to intervene herein and their proposed intervening answer, both herein heretofore filed; and

It appearing to the Court that notice of the intention of said intervenors to present said motion to the Court at this time and place having been duly and seasonably given to all other parties in the cause and affidavit of the giving of said notice having been filed herein; and

It further appearing to the Court that there is no opposition to the granting of said motion and that said movants are entitled to intervene as a matter of right;

It is, accordingly, considered by the Court that said motion for leave to intervene be and the same hereby is granted and it is further considered by the Court that the proposed intervening answer of said intervenors herein heretofore filed be and the same hereby is ordered to be treated as the answer of said intervenors to the complaint as amended.

It Is So Ordered.

[fol. 81] IN UNITED STATES DISTRICT COURT

[Title omitted]

INTERVENING ANSWER OF THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, GULF, COLORADO AND SANTA FE RAILWAY COMPANY, PANHANDLE AND SANTA FE RAILWAY COMPANY, MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, AND THE KANSAS CITY SOUTHERN RAILWAY COMPANY

Now come The Atchison, Topeka and Santa Fe Railway Company, Gulf, Colorado and Santa Fe Railway Company, Panhandle and Santa Fe Railway Company, Missouri-Kansas-Texas Railroad Company, and The Kansas City Southern Railway Company, hereinafter referred to as interveners, and by leave of court file their intervention in the above-entitled cause, and for their separate answer to the complaint herein, allege and say:

I

Intervener, The Atchison, Topeka and Santa Fe Railway Company, is and was at all times hereinafter mentioned, a corporation organized and existing under the laws of the State of Kansas, and is and was engaged in the business of transporting property in interstate commerce, including the transportation of cotton from points on its lines in Oklahoma to certain Gulf ports, namely, Beaumont, Corpus [fol. 82] Christi, Galveston, Houston, Orange, Port Arthur and Texas City, Texas, and Lake Charles, Louisiana.

II

Intervener, Gulf, Colorado and Santa Fe Railway Company, is and was at all times hereinafter mentioned, a corporation organized and existing under the laws of the State of Texas, and is and was engaged in the business of transporting property in interstate commerce, including the transportation of cotton from points on its lines in Oklahoma to certain Gulf ports, namely, Beaumont, Corpus Christi, Galveston, Houston, Orange, Port Arthur and Texas City, Texas, and Lake Charles, Louisiana.

III

Intervener, Panhandle and Santa Fe Railway Company, is and was at all times hereinafter mentioned, a corporation organized and existing under the laws of the State of

Texas, and is and was engaged in the business of transporting property in interstate commerce, including the transportation of cotton from points on its lines in Oklahoma to certain Gulf ports, namely, Beaumont, Corpus Christi, Galveston, Houston, Orange, Port Arthur and Texas City, Texas, and Lake Charles, Louisiana.

IV

Intervener, Missouri-Kansas-Texas Railroad Company, is and was at all times hereinafter mentioned, a corporation organized and existing under the laws of the State of Missouri, and is and was engaged in the business of transporting property in interstate commerce, including the trans-[fol. 83] portation of cotton from points on its lines in Oklahoma to certain Gulf ports, namely, Galveston, Houston, and Texas City, Texas.

V

Intervener, The Kansas City Southern Railway Company, is and was at all times hereinafter mentioned, a corporation organized and existing under the laws of the State of Missouri, and is and was engaged in the business of transporting property in interstate commerce, including the transportation of cotton from points on its lines in Oklahoma to certain Gulf ports, namely, Port Arthur and Beaumont, Texas, and Lake Charles, Louisiana.

VI

By schedules filed with the Commission to become effective June 11, 1941, and later, interveners, and others, proposed to cancel the loading charge on shipments of cotton transported at carload rates from points in Oklahoma to certain Gulf ports, namely, Beaumont, Corpus Christi, Galveston, Houston, Orange, Port Arthur and Texas City, Texas, and Lake Charles, Louisiana. Protests against said schedules were filed with the Commission by L. T. Barringer & Company, plaintiff herein, New Orleans Joint Traffic Bureau, and others. By order dated June 10, 1941, the Commission suspended the operation of said schedules and instituted an investigation as to their lawfulness. Said investigation was designated I. & S. Docket No. 4981, and interveners were named as respondents therein. Copy of the order of suspension and investigation dated June 10, 1941,

in I. & S. Docket No. 4981, is incorporated in the complaint as Appendix A.

January 29, 1942, after full hearing, brief, and oral argument, the Commission, Division 3, entered a report, entitled [fol. 84] I. & S. Docket No. 4981, *Loading Cotton In Oklahoma*, 248 I. C. C. 643, setting forth its findings of fact and conclusions, and holding that the elimination of the loading charge on cotton originating in Oklahoma, compressed in transit, and moving from the compress points to the Gulf ports in question, at the carload rate from origin point, is just and reasonable and not otherwise unlawful. With said report and as a part thereof, the Commission entered the aforesaid order of January 29, 1942, which vacated and set aside the previously entered order of suspension in I. & S. Docket No. 4981, and discontinued the proceeding. Copy of the aforesaid report and order is incorporated in the complaint as Appendix B. Interveners, therefore, have a direct interest in the matter being litigated herein.

VII

Interveners admit that the Commission made the order dated January 29, 1942, referred to in paragraph 1 of the complaint and reproduced as Appendix B on pages 13 to 34 thereof.

VIII

Interveners admit, for the purposes of this suit, that plaintiff, L. T. Barringer & Company, is a corporation organized and existing under the laws of the State of Tennessee. Interveners are without information respecting the other allegations in paragraph 2 of the complaint. They therefore deny said allegations.

IX

Interveners admit the allegations contained in paragraph 3 of the complaint to the extent that they are consistent with the statements and findings of fact contained in the aforesaid report of January 29, 1942.

[fol. 85]

X

Interveners admit the allegations contained in paragraphs 4, 5, 6, 7 and 8 of the complaint.

XI

Intervenors admit, as alleged in paragraph 9 of the complaint, that under date of February 18, 1942, plaintiff filed with the Commission a petition for reconsideration, copy of which is reproduced as Appendix C following page 34 of the complaint. Intervenors allege that under date of March 14, 1942, the respondents in I. & S. Docket No. 4981 filed a reply to said petition.

XII

Intervenors admit the allegations of paragraph 11 of the complaint and allege that the entire Commission, ten Commissioners participating, gave consideration to plaintiff's petition for reconsideration and of respondents' reply thereto, and by order of April 12, 1942, denied said petition.

XIV

Intervenors admit the allegations of paragraph 12 of the complaint.

XV

Intervenors deny the allegations of paragraph 13 of the complaint, and deny that the circumstances and conditions surrounding the transportation of cotton, in carloads, from the Oklahoma points in question to the Gulf ports, are substantially similar to those surrounding the transportation from those points to destination points in the Carolinas or other parts of the Southeast.

[fol. 86]

XVI

Answering paragraph 14 of the complaint, intervenors admit and allege that prior to the filing of the aforesaid schedules, the rail carriers serving the State of Oklahoma assessed a charge when they performed the service of loading shipments of cotton moving at the carload rate from points in Oklahoma to all destinations; that by the schedules in question some of said carriers proposed to cancel said loading charge on shipments to the Texas Gulf ports and Lake Charles, La., in order to meet truck competition; that said carriers did not propose by said schedules to cancel said loading charge on shipments to Memphis or to points in the Southeast for the reasons (1) that the

rates to the Southeast are already relatively lower than they are to the Texas ports; (2) there is no trucking of cotton from Oklahoma to Memphis or to the Southeast; that after investigation of the lawfulness of the schedules the Commission found that they are just and reasonable and that they had not been shown to be otherwise unlawful, that is to say, they had not been shown to violate Section 2, forbidding unjust discrimination, or Section 3(1) prohibiting undue preference and undue prejudice, or any other provision of the Interstate Commerce Act. Interveners, therefore, deny the allegations in said paragraph 14 to the effect that plaintiff is subjected to unjust discrimination or undue prejudice or that its competitors are given an undue preference, in violation of Sections 2 and 3(1) of the Interstate Commerce Act. Interveners allege that the other allegations of said paragraph 14 are irrelevant and immaterial, but, in the event said allegations are deemed to be relevant and material, deny same.

XVII

Interveners deny the allegations contained in paragraph [fol. 87] 15 of the complaint.

XVIII

Interveners allege that the record before the Commission in I. & S. Docket No. 4981, *Loading Cotton in Oklahoma*, failed to disclose that plaintiff is a shipper or consignee of cotton from points in Oklahoma on the lines of respondents in the said proceeding to the Gulf ports, or that plaintiff pays or has paid transportation charges, or loading charges, on cotton shipped from said points to the Gulf ports. Interveners therefore allege that plaintiff is without sufficient legal interest in the subject matter of the commission's order of January 29, 1942, to entitle it to maintain this suit.

Interveners further allege that the Commission's order of January 29, 1942, vacating its previous order of suspension and discontinuing the proceeding, does not deprive plaintiff of any legal right, is not subject to judicial review, and that, therefore, plaintiff is without standing to maintain this suit.

Wherefore, interveners pray that said complaint be dismissed.

The Atchison, Topeka and Santa Fe Railway Company, Gulf, Colorado and Santa Fe Railway Company, Panhandle and Santa Fe Railway Company, Missouri-Kansas-Texas Railroad Company, The Kansas City Southern Railway Company, by R. S. Outlaw, Roland J. Lehman, C. S. Burg, W. E. Davis, Clinton W. McKay, Their Attorneys.

June 18, 1942.

[fol. 88]. IN UNITED STATES DISTRICT COURT

AMENDED COMPLAINT—Filed June 29, 1942

Plaintiff for its amended complaint filed pursuant to stipulation of all parties and order of this Court entered June 29th, 1942, alleges:

1. Paragraphs 1 to 15, inclusive, of plaintiff's complaint herein, together with all appendices thereto, are adopted and incorporated by reference herein.

2. The report and order of the Commission of January 29, 1942, is unlawful and void and beyond the power of the Commission to make because, in entering said report and order, the Commission acted arbitrarily and exceeded its statutory powers in giving effect to a supposed difference in the relative levels of the line-haul freight rates on cotton shipped from Oklahoma to Texas gulf ports, on the one hand, and cotton shipped from Oklahoma to the Southeast and North Carolina, and South Carolina, on the other hand, in its determination of the lawfulness under Section 2 of the Interstate Commerce Act (U. S. C. Title 49, Sec. 2) of the proposal to continue the charge for loading cotton shipped to the Southeast while giving the *the* same service free on cotton shipped to the Texas ports.

Wherefore, plaintiff prays:

1. That an injunction be entered perpetually enjoining and setting aside the operation and effect of the said order of the Commission of January 29, 1942.

2. That plaintiff have such other and further relief in [fol. 89] the premises as the nature of the case shall require and to this Court shall seem proper.

Respectfully submitted, Auvergne Williams, Exchange Building, Memphis, Tennessee; Robert N. Burchmore, Nuel D. Belnap, 2106 Field Building, Chicago, Illinois, Attorneys for the Plaintiff.

Walter, Burchmore & Belnap, of Counsel.

[fol. 90] IN UNITED STATES DISTRICT COURT

ORDER—Entered June 29, 1942. Marion S. Boyd, Judge

This cause coming on to be heard upon plaintiff's motion for leave to file an amended complaint and upon stipulation of all parties, agreeing thereto.

It Is Ordered that plaintiff's motion for leave to file an amended complaint be, and it is hereby granted, that the answers heretofore filed may stand and serve as answers to the amended complaint, and that the denial contained in said answers of the allegations in Paragraph 15 of the complaint shall be construed to constitute a denial of the allegations of Paragraph 2 of the amended complaint.

Dated June 29th, 1942.

[fol. 91] IN UNITED STATES DISTRICT COURT

REPORTER'S TRANSCRIPT—Filed August 1, 1942

Be It Remembered, That the above-styled cause came on to be heard, on application of the Plaintiff for an Injunction, on this 8th day of July, 1942, before this Honorable Court, composed of the following:

Hon. John D. Martin, Judge, U. S. Circuit Court of Appeals, Sixth Judicial District.

Hon. Marion S. Boyd, U. S. District Judge, Western District Tennessee.

Hon. Leslie R. Darr, U. S. District Judge, Eastern and Middle Districts of Tennessee.

Hon. John D. Martin, Presiding.

Appearances:

Mr. Nuel D. Belnap and Mr. Auvergne Williams for plaintiff.

Mr. Robert Pierce, Assistant Attorney General, Washington, D. C. for United States.

Mr. J. Stanley Payne, Asst. Chief Counsel, Interstate Commerce Commission, Washington, D. C. for Interstate Commerce Commission.

Mr. Roland J. Lehman, of Chicago, Illinois for Santa Fe Railway.

Judge Martin: Are you gentlemen ready to proceed?

Mr. Belnap: If your Honors please, I represent the plaintiff in this case. Before I proceed with my argument, I would like to offer a few exhibits for the record. First I would like to have marked and received as Exhibit #1 Petition for suspension of elimination of loading charges on cotton from Oklahoma to Gulf Ports, Lake Charles, Louisiana and West. I do not have the certificate of the Commission on that document. It is a part of the Commission's record. I understand that opposing counsel will concede that?

Mr. Payne: Yes, sir.

[fol. 92] Judge Martin: Does the Court understand the defendants' attorneys are agreeable to the filing of that as part of the record?

Mr. Payne: What's that, now?

Mr. Belnap: Petition for suspension which the plaintiff filed with the Commission. It does not have the Commission's certificate.

Mr. Payne: I recognize that as an exact copy of the document filed with the Interstate Commerce Commission, therefore I have no objection to receiving it without it being certified.

Judge Martin: Let it be filed.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit #1.)

Mr. Belnap: I have here with the clerk of the Court a certified copy of the transcript of evidence and exhibits in the hearing before the Interstate Commerce Commission. I ask to have that marked and received as exhibit #2 for plaintiff.

Judge Martin: Any objection to that?

Mr. Pierce: No objection at all.

Judge Martin: Let it be filed for the record.

(The transcript of evidence referred to was thereupon received in evidence and marked Plaintiff's Exhibit #2.)

Mr. Belnap: Thirdly, I have affidavit of L. T. Barringer, President of L. T. Barringer & Company, and I ask that it be received solely on the issue of the standing of the plaintiff.

Judge Martin: Any objection?

Mr. Payne: If your Honors please, we have no objection to its introduction, but would like to make the observation that the affidavit cites a number of facts, and ordinarily evidence introduced before the Commission is not received before being introduced. We have no objection to the affidavit if it is received solely in reference to the standing of the plaintiff to maintain the suit. This affidavit purports to show facts which would indicate the standing on the part of the plaintiff to maintain the suit, and directed to that point, we have no objection to the affidavit.

Judge Martin: What is your limitation on it.

[fol. 93] Mr. Payne: We think it may be received and considered solely in reference to that question and not as evidence supplementing the evidence before the Commission.

Judge Martin: Let it be received in evidence on the stipulation of defendants' attorneys for that purpose only.

(The affidavit referred to was thereupon received in evidence and marked plaintiff's Exhibit #3.)

Mr. Belnap: We ask leave to have the clerk receive draft of plaintiff's proposed findings of fact and questions of law.

Judge Martin: You decide to file those, to be submitted as proposed findings of fact?

Mr. Belnap: Yes, your Honors.

Judge Martin: Do the defendants likewise have any of the Commission's findings to offer?

Mr. Pierce: If your Honors please, I think we should wait until the Court has rendered its opinion before doing that.

Judge Martin: If you have the proposed findings, we think it would be well for you to submit them now, because the Court might consider them in determining the case.

Mr. Pierce: We haven't them with us today, but Mr. Payne has said that they can be supplied by the end of the month.

Judge Martin: End of the month?

Mr. Pierce: Yes, sir.

Judge Martin: We hadn't any idea that this would be delayed until the end of the month.

Mr. Payne: May I say this: the report of the Interstate Commerce Commission we think sets out the facts fully. The other findings would be more or less pro forma.

Judge Martin: It would have been of considerable assistance to the Court if counsel for both sides had prepared suggested findings. Then we could have heard the evidence. Would it be possible for you gentlemen to submit to the Court proposed findings on the salient points which you deem highly important not later than tomorrow?

[fol. 94] Mr. Payne: I think we can prepare proposed findings this afternoon.

Judge Martin: While we are on that subject, I want to pursue it a little farther, because the Court has already read the briefs and considered the documents filed. We would like to decide the case promptly, after giving it a full hearing and a full consideration, and not delay rendering our decision. Moreover, while we are together, we would like to have counsel's proposed findings. When I was District Judge I found it most convenient to discuss the findings submitted by the respective contending parties in Court. Ordinarily we would agree on nine-tenths of the findings and then the attorneys would fight over the disputed facts. I take it there are many of the proposed findings of the plaintiff which the defendants agree are routine matters, and others on which you do not wholly agree. Could you take the proposed findings of the plaintiff and check them over and agree on what you can? That would simplify the proposition, and will save a lot of time.

Mr. Payne: All right, sir.

Mr. Belnap: That concludes all the documents I desire to offer prior to my argument.

Mr. Payne: We have only one bit of evidence, and that is a certified copy of the reply filed by the respondents in the proceeding before the Commission to the plaintiff's petition for reconsideration. That is certified by the Secretary of the Commission and I offer it in evidence as Defendant's Exhibit #1.

Judge Martin: Any objection?

Mr. Belnap: No objection.

Judge Martin: Let it be received and marked for the record.

(The document referred to was thereupon received in evidence and marked Defendant's Exhibit #1.)

(Argument of Counsel.)

[fol. 95] (After argument of counsel, the following occurred):

Mr. Belnap: Before we start on this matter of findings, I would like to ask leave to supplement the record in one or two particulars. First, I would like to offer in evidence the brief of the respondents in the case before the Commission which I handed to the Court this morning.

Judge Martin: Any objection, gentlemen?

Mr. Payne: Is that the brief?

Mr. Belnap: Yes.

Mr. Payne: We have no objection to that.

Judge Martin: Without objection, the brief may be received and filed.

*(The brief referred to was thereupon received in evidence and marked Plaintiff's exhibit #4:)

Mr. Belnap: Then, if your Honors please, there was some discussion between the Court and Counsel as to the Santa Fe maintaining, without the concurrence of any other carrier, the loading charge in question, the Santa Fe compelling that charge through the medium of some transit arrangement, and retaining the entire amount of that money in its own treasury without dividing it with other carriers. I can't be sure, without reading the entire record page by page, that there is nothing in the record as to the retention of that charge. However, I believe that regardless of whether that fact was stated, the Commission would take judicial notice of the fact that it was so treated. Mr. Payne, when the matter was under discussion, stated that he would object to that being stipulated. In view of that, I now state the fact as I understand it to be, and that is that the individual line retains in its own treasury the entire amount of the loading charge so compelled. Does that state the facts, Mr. Lehman?

Mr. Lehman: I ascertained by long distance telephone a short while ago, in conversation with one of our traffic officials in Chicago, that the loading charges were, where assessed, compelled by the originating carrier; and that the loading service, when performed free and without cost to

The shipper, is absorbed by the originating carrier. How-
[fol. 96] ever, as stated by the witness, on page 69 of the
record herein, I was also informed that whether or not the
loading charge would be assessed or would be eliminated
would depend entirely upon the attitude of our connecting
carriers.

Mr. Belnap: Do I understand, Mr. Lehman, that you
agree that the Santa Fe, if it chose to disagree with its con-
necting carriers, would put the charge on or take it off,
regardless of what your connecting carriers might think
about it?

Mr. Lehman: I couldn't state without absolute qualifica-
tion, but I believe, from my personal knowledge of the mat-
ter, that the Santa Fe could remove the charge if it sought
to disregard the interests of the carriers with whom it must
continue to have relations.

Mr. Belnap: But it is a fact that if the Santa Fe collects
it, it retains the entire amount in its own treasury?

Mr. Lehman: That's correct, I believe.

Mr. Pierce: I think that is somewhat immaterial.

Mr. Belnap: Would you be willing to stipulate that, sub-
ject to your contention that it is immaterial?

Mr. Pierce: I think I would have no objection.

Mr. Belnap: How about the Interstate Commerce Com-
mission?

Mr. Payne: I shall be compelled to object for reasons
which I will state very briefly: that if evidence of this kind
were receivable by the Court, the Court would be called
upon to weigh that evidence, and therefore, I think it is
wholly inadmissible.

Judge Martin: Then you don't agree to stipulate it?

Mr. Payne: No, sir.

Judge Martin: Then under our previous ruling, it is not
to be received in evidence. Have you any other evidence to
offer?

Mr. Belnap: I am willing to close the record as far as the
presentation of evidence is concerned.

Argument by counsel.

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed July
17, 1942

In the above entitled case, the Court makes the following findings of fact and of law:

Findings of Fact

1. For some years prior to April 21, 1942, the railroads which have intervened in this suit and the Oklahoma Railway Company maintained on cotton re-shipped from concentrating points under carload rates a loading charge of 5.5 cents per square bale and 2.75 cents per round bale if the cotton was loaded by said railroads at a point of origin served by them in Oklahoma after tender to said railroads at a depot or cotton platform for shipment therefrom to the concentrating point.

2. Said loading charge is contained as a separate item in the rate and transit tariffs filed by said railroads with the Interstate Commerce Commission (hereinafter referred to as the Commission) and applied to all such cotton so tendered and loaded by said railroads, regardless of the ultimate destination to which said cotton was reshipped in carloads from the concentrating point.

[fol. 98] 3. Said loading charge was a charge which was maintained and assessed by the individual railroad performing the loading service.

4. The cotton to which said loading charge applied was handled and the rates and charges accruing thereon were collected in the following manner: The cotton originated at a country station (hereinafter referred to as a gin point) at which point it was tendered to the railroad at its depot or cotton platform by a shipper, with the request that the cotton be loaded by the railroad and transported to a nearby compress. When so tendered, the carrier loaded the cotton into a car, utilizing the labor of its agency forces or section gangs. The cotton was then transported in lots of one bale or more to the nearby compress specified by the shipper and, upon said movement, the carrier collected its local "float-in" or transit rate for the inbound line-haul service from the gin point to the compress station. Ordinarily, the

charge for loading was not collected at that time but, as authorized by the railroad tariff-s, followed the shipment as an advance charge, such advance charge being inserted in the original bill of lading. At some later date, after compression, the cotton was reshipped in a carload lot to a final destination, such as a gulf port or a domestic mill in the southeast or the Carolinas. At the time of that reshipment, the carrier collected its carload rate from the compress station to final destination for the outbound line-haul service rendered. The carriers maintained in tariffs filed with the Commission various levels of carload rates made dependent upon the minimum weight loaded, the different carload rates being governed by minima of 25,000, 35,000, 50,000 and 65,000 pounds. On cotton so transported, the railroad tariffs authorized a subsequent readjustment of the inbound and outbound rates as originally assessed for line-haul services to the basis of the through carload rate from [fol. 99] the gin point to final destination. This is called a transit settlement and the loading charge, when applicable, was ordinarily collected at the time the transit settlement was made.

5. By tariff-s filed with the Commission to become effective June 11, 1941, the railroads referred to in paragraph 1 above (said railroads being hereinafter referred to as respondents) proposed to cancel the loading charge hereinabove described on cotton reshipped to Beaumont, Corpus Christi, Galveston, Houston, Orange, Port Arthur, and Texas City, Texas, and Lake Charles, La. (said destination being hereinafter referred to as the Texas ports), and to continue said loading charge on cotton reshipped in carloads from concentrating points to all other destinations.

6. On petition and protest from numerous interests, including L. T. Barringer and Company, the plaintiff herein, the Commission, acting under the authority conferred upon it by Section 15(7) of the Interstate Commerce Act entered an order on June 10, 1941, which postponed the effective date of said schedules until January 11, 1942, and instituted an investigation into the lawfulness thereof. The proceeding instituted by the Commission was entitled Investigation and Suspension Docket No. 4981, Loading Cotton in Oklahoma, and will be hereinafter referred to as I. & S. 4981. Subsequently, the respondents further postponed the effective

tive date of said schedules until the termination of the proceedings before the Commission.

7. Hearing was had in I. & S. 4981 before an examiner of the Commission at New Orleans, La., on July 19, 1941, at which evidence was received from the respondents who supported the schedules and from the protestants, including the plaintiff, who opposed the proposed schedules.

8. On January 29, 1942, after full hearing, brief, and oral argument, the Commission, by Division 3, entered a report [fol. 100] in I. & S. Docket No. 4981 setting forth its findings of fact and conclusions, and holding that the elimination of the loading charge on cotton originating in Oklahoma, compressed in transit, and moving from the compress points to the Gulf ports in question at the carload rate from origin point is just and reasonable and not otherwise unlawful. With said report, and as a part thereof, the Commission entered an order dated January 29, 1942, which vacated and set aside the previously entered order of suspension in I. & S. Docket 4981 as of February 21, 1942, and discontinued the proceeding.

9. On February 18, 1942, the plaintiff filed with the Commission its petition for reconsideration in said proceeding in which it urged that under the facts and law the Commission should have found the proposal to be unlawful and in violation of Sections 2 and 3 of the Interstate Commerce Act, and requested that the report and order of January 29, 1942, be modified accordingly and the respondents be required to cancel the proposed change. The Commission, pending action on that petition, deferred the effective date of its order of January 29, 1942, to April 21, 1942.

10. By order of April 13, 1942, the Commission denied the petition of the plaintiff for reconsideration and the change in the tariff schedules was permitted to and did become effective on April 21, 1942, and is now in effect.

11. Plaintiff, L. T. Barringer and Company, a cotton merchant of Memphis, Tennessee, by bill of complaint filed on or about May 11, 1942 prays that this Court perpetually enjoin and set aside the operation and effect of the said order of the Commission of January 29, 1942.

12. By order entered on June 29, 1942, the Atchison, Topeka & Santa Fe Railway Company, Gulf, Colorado &

Santa Fe Railway Company, Panhandle & Santa Fe Rail-
[fol. 101] way Company, Missouri-Kansas-Texas Railroad
Company and Kansas City Southern Railway Company,
respondents before the Commission in I. & S. Docket No.
4981, were permitted to intervene as parties defendant
herein.

13. The physical service of loading cotton tendered to a
respondent in any particular depot or cotton platform in
Oklahoma for shipment to a particular concentrating point
is the same on cotton subsequently reshipped in a carload
from the concentrating point to the Texas ports as on cotton
subsequently reshipped in a carload from the concentrating
point to other destinations, such as domestic mill points in
the southeast or the Carolinas.

14. The tariff change approved by the Commission pro-
vides for the loading of cotton without charge when re-
shipped from concentrating point, in carloads, to the Texas
ports only if the cotton is tendered to a respondent at its
depot or cotton platform at the inception of the inbound
line-haul move from gin point to compress station, and does
not apply to cotton other than that which moves from the
station at which loaded to a concentrating point on the
basis of inbound "float-in" or transit rates.

15. Hearing before this Court, specially constituted of
three Judges as required by the Urgent Deficiencies Act,
was held July 8, 1942. A certified copy of the oral testi-
mony and documentary exhibits introduced in the proceed-
ing before the Commission, and certain other documents
considered by the Commission, were received in evidence
by the Court, together with an affidavit filed by plaintiff,
which was received solely on the question whether plaintiff
possesses sufficient legal interest to bring and maintain this
suit.

16. With its order of January 29, 1942, the Commission
issued a report containing its findings of fact, decision and
[fol. 102] conclusions.

17. Upon the hearing before the Commission, the re-
spondents sought to justify the difference in the charges
for loading cotton reshipped to the Texas ports, on the one
hand, as compared with the charges for loading cotton re-
shipped to all other destinations, on the other hand, on two

grounds, among others, i. e., (1) they urged that the free loading to the Texas ports was necessary to meet truck competition and that there was no truck competition to the southeast and to the Carolinas; and (2) they contend that the difference in loading charge was justified because the carload rates assessed for the line-haul services from Oklahoma to the southeast and the Carolinas are relatively lower than the carload rates assessed for the line-haul services from Oklahoma to the Texas ports.

18. As to the first ground: the evidence before the Commission showed the same truck competition from gin points to compress stations for cotton later reshipped to the southeast and the Carolinas as for cotton later reshipped to the Texas ports.

19. As to the first ground: the evidence also showed there was no truck competition from Oklahoma compresses to southeastern or Carolina destinations, although there was truck competition from Oklahoma compresses to the Texas ports.

20. As to the first ground: the only destination embraced within the term "Texas ports" for which any evidence was presented as to specific tonnage of cotton transported by truck from Oklahoma gin points was Houston, Texas.

21. As to the second ground: the evidence before the Commission was confined to a comparison of the rates, distance, ton mile earnings, and car mile earnings involved, but no evidence was offered as to the specific costs of the respective line-haul services or as to any transportation [fol. 103] circumstance and condition incident to line-haul services other than the mere matter of distance.

22. The evidence offered before the Commission by the plaintiff showed that it purchases cotton in Oklahoma for reshipment to the southeast and Carolinas in competition with other merchants purchasing cotton in Oklahoma for reshipment to the Texas ports; that if the proposed change were permitted to become effective, the plaintiff would be compelled to pay a charge for having its cotton loaded by the respondents, while its competitors would be able to obtain a similar loading service from the respondents without charge; and that this difference in charges would impose a

competitive disadvantage upon the plaintiff in the purchasing of Oklahoma cotton.

23. The Court adopts as its own the findings of fact set forth in the said report of the Commission.

24. The Commission found, inter alia, that there is (1) no trucking of cotton between points in Oklahoma and the Southeast, whereas there is trucking of cotton between points on Oklahoma and the Gulf ports, (2) that the carload rates on cotton from Oklahoma origins to the Southeast are on a relatively lower basis than the carload rates on cotton from the same origin to the Gulf ports, and (3) that the rates from points in Oklahoma both to the Southeast and to the Gulf ports are depressed.

25. The Commission also found, inter alia:

"In the Southwestern Cotton case the Commission at page 724 said:

"The practices which may have prevailed in the past with respect to free transit are no criteria in the present circumstances. In the past there was substantially no unregulated competition and the rates were not depressed. If the carriers gave a free service in one instance it was not unreasonable to expect them to give it in another. Now the situation has changed. In the present circumstances it is not only the carriers' right but their duty to conduct their operations in the most economical manner possible, in order [fol. 104] to retain the greatest net revenue out of the low competitive rates which they are compelled to charge. The fact that they have provided certain transit services without charge in addition to the transportation rates, in instances where that seems to be good business policy from a competitive standpoint affords no basis for requiring them to assume the additional burden and expense incident to such services where the opportunities for corresponding benefits to them are lacking."

"This was said with reference to the circumstances which distinguish the granting of transit in the interior but not at the ports. It applies with equal force to either of the situations presented in the proceedings now before us."

26. The ultimate findings of the Commission were:

"We, therefore, find that the elimination of the rail carriers' loading charge on cotton originating in Oklahoma on respondents' lines, compressed in transit and moving from compress point to Texas-Gulf ports and Lake Charles, La., at the carload rate from origin points, is just and reasonable and not shown to be otherwise unlawful.

"We further find that the re-establishment of the loading charge on shipments of cotton originating in Texas on the St. Louis, San Francisco and Texas Railway Company and destined to the same points, including New Orleans, La., for export, is just and reasonable and not shown to be otherwise unlawful."

Conclusions of Law

1. The Interstate Commerce Commission in its report made essential basic findings of fact, supported by substantial evidence of record.

2. The Commission did not exceed its authority and the power conferred upon it by the Interstate Commerce Act in entering the order sought to be enjoined, and the Commission's action was not arbitrary.

3. The findings of the Commission are adequately supported by substantial evidence.

4. In determining whether or not the provisions of Sections 2 and 3 of the Interstate Commerce Act have been violated by the publication of the tariffs under consideration herein the Commission properly considered the dissimilarity in circumstances and conditions between the line-haul movement of cotton from Oklahoma origins to the southeast and the line-haul movement of cotton from Oklahoma points to the Gulf ports here involved.

5. The Commission's findings support its ultimate conclusion that the rail tariffs under consideration are just and reasonable and not otherwise unlawful.

(S.) John D. Martin, Circuit Judge; (S.) Leslie R. Darr, District Judge; (S.) Marion S. Boyd, District Judge.

[fol. 106] IN UNITED STATES DISTRICT COURT

OPINION OF COURT—Filed July 17, 1942

Before Martin, Circuit Judge, and Darr and Boyd,
District Judges

PER CURIAM:

This cause came on to be heard on the complaint of L. T. Barringer & Company praying a perpetual injunction and cancellation of the operation and effect of an order of the Interstate Commerce Commission dated January 29, 1942, and upon the responsive pleadings of the defendants and interveners, and upon the full record in the cause, including the order of the Interstate Commerce Commission, the transcript of the hearing before the Interstate Commerce Commission, and exhibits filed and considered at such hearing.

The Court is of opinion that the Interstate Commerce Commission, in its report, made essential basic findings of fact, supported by substantial evidence of record; and that the order of the Commission is lawful.

Contemporaneously herewith, the Court has filed findings of fact and conclusions of law deemed appropriate.

[fol. 107] The complaint, accordingly, is dismissed with proper costs.

John D. Martin, Circuit Judge. Leslie R. Darr,
District Judge. Marion S. Boyd, District Judge.

July 17, 1942.

[fol. 108] IN UNITED STATES DISTRICT COURT

FINAL DECREE—Entered August 17, 1942

This cause having been heard upon the pleadings, the testimony and exhibits submitted before the Interstate Commerce Commission, and the oral and written arguments of counsel, and the Court now being fully advised in the premises, it having made and entered findings of fact and conclusions of law, it is by the Court this 17th day of August 1942.

Ordered, Adjudged and Decreed That the complaint be, and it is hereby, dismissed for want of equity at the plaintiff's costs.

John D. Martin, United States Circuit Judge. Leslie
R. Darr, United States District Judge. Marion
S. Boyd; United States District Judge.

IN THE
District Court of the United States

WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

L. T. BARRINGER AND COMPANY,	}	Civil Action
Plaintiff,		
vs.		
UNITED STATES OF AMERICA and	}	File No. 431
INTERSTATE COMMERCE COMMIS-		
SION,		
Defendants.		

PETITION FOR APPEAL

L. T. Barringer and Company, plaintiff, feeling aggrieved by the final decree of the District Court of the United States for the Western District of Tennessee, Western Division, entered August 17, 1942, prays an appeal from said decree to the Supreme Court of the United States.

The particulars wherein said plaintiff considers the decree erroneous are set forth in the assignment of errors accompanying this petition, to which reference is hereby made.

Said plaintiff prays that a transcript of the record, proceedings and papers upon which said decree was

made and entered, duly authenticated, be transmitted forthwith to the Supreme Court of the United States.

Dated October 7, 1942.

AUVEGNE WILLIAMS,
Exchange Building,
Memphis, Tennessee.

NUEL D. BELNAP,
2106 Field Building,
Chicago, Illinois.

*Attorneys for L. T. Barringer
and Company, Plaintiff.*

IN THE

District Court of the United States

WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

L. T. BARRINGER AND COMPANY,

Plaintiff,

vs.

**UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,**

Defendants.

Civil Action

File No. 431

ASSIGNMENT OF ERRORS

Now comes L. T. Barringer and Company, plaintiff in the above-entitled cause, and files the following assignment of errors upon which it will rely in the prosecution of its appeal to the Supreme Court of the United States herewith petitioned for in said cause, from the decree of the District Court of the United States for the Western District of Tennessee, Western Division, entered on the 17th day of August, 1942:

1. In adopting as its own the findings of fact set forth in the report of the Interstate Commerce Commission of January 29, 1942, in Investigation and Suspension Docket No. 4981, the Court erred (a) in failing to specify what language in said report constituted the

findings of fact so adopted, and (b) in adopting findings of fact which are not supported by substantial evidence before the Commission.

2. The Court erred in holding as a fact that the Interstate Commerce Commission found that the car-load rates on cotton from Oklahoma origins to the Southwest are on a relatively lower basis than the car-load rates on cotton from the same origins to the Gulf ports.

3. The Court erred in holding as a fact that the Interstate Commerce Commission found that there is a difference in the matter of truck competition as between cotton transported from the particular Oklahoma origins, at which the tariff provisions under investigation applied, to the Southeast, on the one hand, and cotton from the same Oklahoma origins to the Gulf ports, on the other hand.

4. The Court erred in concluding as a matter of law that the Interstate Commerce Commission made essential, basic findings of fact in its report.

5. The Court erred in concluding as a matter of law that the findings entered by the Interstate Commerce Commission are adequately supported by substantial evidence.

6. The Court erred in concluding as a matter of law that the Interstate Commerce Commission did not exceed its authority and power conferred upon it by the Interstate Commerce Act in entering the order sought to be enjoined, and that the Commission's action was not arbitrary.

7. The Court erred in concluding as a matter of law that the Interstate Commerce Commission had the right to consider the dissimilarity in circumstances and conditions between the line-haul movement of cotton from

Oklahoma origins to the Southeast and the line-haul movements of cotton from Oklahoma origins to the Gulf ports in determining whether the tariffs under investigation, which proposed to make effective a difference in the separately stated charges for loading such cotton at the origins thereof, would result in a violation of Sections 2 and 3 of the Interstate Commerce Act.

8. The Court erred in failing to conclude that the Interstate Commerce Commission is not entitled to consider a difference in the matter of truck competition encountered by rail carriers in connection with line-haul services in determining whether or not Section 2 of the Interstate Commerce Act would be violated by the elimination of the charge for loading of cotton when reshipped to Gulf ports while contemporaneously continuing a separately established charge for the loading of cotton at the same origins when reshipped to the Southeast.

9. The Court erred in failing to find that Section 2 of the Interstate Commerce Act prohibits a difference in the charges for performing an identical service of loading cotton at the same origin, even though there is a difference in the ultimate destinations to which the cotton so loaded may be reshipped, and even though there is a difference in the relative levels of the rates assessed for the respective line-haul services.

10. The Court erred in failing to find that the lawfulness under Section 3 of the Interstate Commerce Act of tariff provisions relating to the loading of cotton at particular origins must be determined by the Interstate Commerce Commission in the light of the conditions and circumstances directly related to the charge for the loading service under consideration, and without regard to the charges assessed for the

services rendered in the line-haul transportation of the cotton so loaded.

11. The Court erred in failing to conclude that the Interstate Commerce Commission acted arbitrarily and in excess of its statutory powers in failing and refusing to find that the proposed difference in loading charges under investigation would create a violation of Section 2 of the Interstate Commerce Act, and in failing to make specific findings in disposition of the issue tendered by the plaintiff under Section 2 of the Interstate Commerce Act.

12. The Court erred in concluding that the Commission's findings support its ultimate conclusion that the rail tariffs under consideration are just and reasonable and not otherwise unlawful.

13. The Court erred in failing to enjoin and set aside the order of the Commission as null and void and contrary to law.

14. The Court erred in dismissing the complaint.
Dated October 7, 1942.

AUVERGNE WILLIAMS,
Exchange Building,
Memphis, Tennessee.

NUEL D. BELNAP,
2106 Field Building,
Chicago, Illinois.
*Attorneys for L. T. Barringer
and Company, Plaintiff.*

IN THE
District Court of the United States
 WESTERN DISTRICT OF TENNESSEE
 WESTERN DIVISION

L. T. BARRINGER AND COMPANY, <div style="text-align: right; margin-right: 20px;">Plaintiff,</div>	vs.	Civil Action File No. 431
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMIS- SION,		Defendants.

ORDER ALLOWING APPEAL

(Filed Oct. 7, 1942)

L. T. Barringer and Company, plaintiff, having made and filed its petition praying for an appeal to the Supreme Court of the United States from the final decree of this Court herein, entered August 17, 1942, and having also made and filed an assignment of errors and a statement of jurisdiction, and having in all respects conformed to the statutes and rules of the Court in such case made and provided, it is

Ordered and Decreed that the appeal be, and the same is hereby, allowed as prayed for,

And it is further

Ordered that petitioner give bond in the sum of \$250 as a cost bond.

Dated October 7, 1942.

.....
United States District Court Judge.

IN THE
District Court of the United States

WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

<p>L. T. BARRINGER AND COMPANY,</p> <p style="text-align: right; margin-right: 20px;">Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>UNITED STATES OF AMERICA and</p> <p>INTERSTATE COMMERCE COMMIS-</p> <p>SION,</p> <p style="text-align: right; margin-right: 20px;">Defendants.</p>	}	<p>Civil Action.</p> <p>File No. 431</p>
---	---	--

CITATION ON APPEAL

To: United States of America; Interstate Commerce Commission; The Atchison, Topeka and Santa Fe Railway Company; Gulf, Colorado and Santa Fe Railway Company; Panhandle and Santa Fe Railway Company; The Kansas City Southern Railway Company; Missouri-Kansas-Texas Railroad Company.

Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States in the City of Washington, District of Columbia, on the 14th day of November, 1942, pursuant to an order filed and entered in the office of the District Court of the United States for the Western District of Tennessee, Western Division, allowing an appeal from a decree entered August 17, 1942, in the above-entitled cause, to show cause, if any there be, why said decree rendered against plaintiff-appellant should not be reversed and

set aside and why justice should not be done in behalf of said plaintiff-appellant.

Witness, the Honorable Marion S. Boyd, District Court Judge for the United States District Court for the Western District of Tennessee, Western Division.

Dated October 7, 1942.

.....
U. S. District Court Judge.

Service of the above citation on appeal and receipt of a copy thereof is hereby acknowledged on the date set opposite our respective names:

October, 1942.

.....
Attorney General, counsel for defendant
United States of America.

October, 1942.

.....
United States District Attorney, counsel
for defendant United States of America.

October, 1942.

.....
J. Stanley Payne, counsel for defendant
Interstate Commerce Commission.

October, 1942.

.....
Roland J. Lehman, counsel for interven-
ing defendants the Atchison, Topeka
& Santa Fe Railway Co., and others.

October, 1942.

.....
R. S. Outlaw, counsel for intervening
defendants the Atchison, Topeka &
Santa Fe Railway Co., and others.

October, 1942.

.....
C. E. Burg, counsel for intervening de-
fendants the Atchison, Topeka & Santa
Fe Railway Co., and others.

October, 1942.

.....
W. E. Davis, counsel for intervening de-
fendants the Atchison, Topeka & Santa
Fe Railway Co., and others.

October, 1942.

.....
Clinton H. McKay, counsel for interven-
ing defendants the Atchison, Topeka
& Santa Fe Railway Co., and others.

[fols. 139-142] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed October 15, 1942

To the Honorable the Attorney General of the State of Tennessee:

Pursuant to Urgent Deficiencies Act of October 22, 1913, 38 Stat. 221, you are hereby notified that the plaintiff, L. T. Barringer and Company, took an appeal on October 7, 1942, from the final decree of the United States District Court, entered in the above-entitled case on August 17, 1942, and that the order allowing the appeal makes the same returnable on the 14th day of November, 1942.

Auvergne Williams, Exchange Building, Memphis, Tennessee; Nuel D. Belnap, 2106 Field Building, Chicago, Illinois, Attorneys for Plaintiff.

Service of a copy of the foregoing notice is hereby acknowledged this 13 day of October, 1942.

Roy H. Beeler, Attorney General, State of Tennessee.

[fol. 143] Bond on appeal for \$250, approved and filed October 13, 1942, omitted in printing.

[fol. 144] IN UNITED STATES DISTRICT COURT

STIPULATION IN RE ORIGINAL PAPERS—Filed October 15, 1942

It is stipulated and agreed that the Clerk in preparing the record on appeal for transmittal to the Supreme Court of the United States of America in the above-entitled matter, shall transmit to said Court as original papers under Paragraph 4 of Rule 10 of the Revised Rules of the Supreme Court of the United States of America, plaintiff's Exhibits 1, 2, 3, and 4, and defendants' Exhibit 1, instead of a transcript thereof.

Auvergne Williams, Counsel for plaintiff L. T. Barringer and Company. Robert L. Pierce, Special Assistant to Attorney General, Counsel for defendant United States of America. J. Stanley Payne, Counsel for defendant Interstate Commerce Com-

mission. R. S. Outlaw, Counsel for intervening defendants the Atchison, Topeka & Santa Fe Railway Co., and others. W. E. Davis, Counsel for intervening defendants the Atchison, Topeka & Santa Fe Railway Co., and others. Nuel D. Belnap, Counsel for plaintiff L. T. Barringer and Company. William McClanahan, U. S. District Attorney, Counsel for defendant United States of America. Roland J. Lehman, Counsel for intervening defendants the Atchison, Topeka & Santa Fe Ry. Co., and others. C. S. Burg, Counsel for intervening defendants the Atchison, Topeka & Santa Fe Ry. Co., and others. Clinton H. McKay, Counsel for intervening defendants the Atchison, Topeka & Santa Fe Railway Co.

IN THE
District Court of the United States

WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

L. T. BARRINGER AND COMPANY,
 Plaintiff,

vs.

**UNITED STATES OF AMERICA and
 INTERSTATE COMMERCE COMMISSION,**

Defendants.

Civil Action

File No. 431

**PLAINTIFF'S (APPELLANT'S) PRAECIPE FOR
 TRANSCRIPT OF RECORD**

TO THE CLERK OF THE ABOVE-NAMED COURT:

You are hereby requested, pursuant to Rule 10(2) of the Revised Rules of the Supreme Court of the United States, to prepare a transcript of record in the above-entitled cause to be filed in the Supreme Court of the United States, pursuant to an appeal allowed therein, and to include in such transcript of record the following, to-wit:

- (1) Complaint.
- (2) Answer of the United States of America.
- (3) Answer of the Interstate Commerce Commission.
- (4) Motion of The Atchison, Topeka & Santa Fe Railway Company, *et al.*, for intervention, notice of said motion and order granting said motion.

(5) Intervening answer of The Atchison, Topeka & Santa Fe Railway Company, *et al.*

(6) Amended complaint.

(7) Order granting leave to file amended complaint.

(8) Reporter's transcript of proceedings at the hearing on July 8, 1942.

(9) Plaintiff's Exhibits 1, 2, 3, and 4 and defendants' Exhibit 1 as received in evidence at the hearing on July 8, 1942.

(10) Findings of fact and conclusions of law entered by the Court on July 17, 1942.

(11) Opinion of the Court entered July 17, 1942.

(12) Final decree of August 17, 1942.

(13) Petition for appeal.

(14) Assignments of errors.

(15) Statement of jurisdiction of the Supreme Court of the United States of America.

(16) Order allowing appeal.

(17) Citation on appeal.

(18) Notice to the Attorney General of the State of Tennessee.

(19) Statement by plaintiff-appellant directing attention to the provisions of Paragraph 3 of Rule 12 of the revised rules of the Supreme Court of the United States of America.

(20) Appeal bond and order of Court approving said bond.

(21) Stipulation of parties and order of Court directing Clerk to send certain original papers to the Supreme Court of the United States in lieu of copies thereof.

(22) Plaintiff's (appellant's) praecipe for transcript of record.

AUVERGNE WILLIAMS,
Exchange Building,
Memphis, Tennessee.

NUEL D. BELNAP,
2106 Field Building,
Chicago, Illinois.

*Attorneys for L. T. Barringer and
Company, Plaintiff.*

AFFIDAVIT OF SERVICE.

Auvergne Williams, being duly sworn, according to the law deposes and says that he is one of the attorneys of record for L. T. Barringer and Company, the plaintiff-appellant herein, and that he has served copies of the foregoing praecipe upon all of the defendants (appellees), by depositing the same, properly addressed, to their respective attorneys of record, in the United States mails in Memphis, Tenn., on the day of October, 1942, in sealed envelopes, first-class postage prepaid, said attorneys being:

MR. ROBERT L. PIERCE,
Special Asst. to Attorney General
Department of Justice,
Washington, D. C.,

Counsel for defendant United States of America.

MR. WILLIAM McCLANAHAN,
United States District Attorney,
Memphis, Tennessee,

Counsel for defendant United States of America.

MR. J. STANLEY PAYNE,
Assistant Chief Counsel,
Interstate Commerce Commission,
Washington, D. C.,

Counsel for defendant Interstate Commerce Commission.

MR. ROLAND J. LEHMAN,
1211 Railway Exchange,
Chicago, Illinois,

Counsel for intervening defendants the Atchison,
Topeka & Santa Fe Railway Co., and others.

MR. R. S. OUTLAW,
1211 Railway Exchange,
Chicago, Illinois,

Counsel for intervening defendants the Atchison,
Topeka & Santa Fe Railway Co., and others.

MR. C. E. BURG,
Railway Exchange,
St. Louis, Missouri,

Counsel for intervening defendants the Atchison,
Topeka & Santa Fe Railway Co., and others.

MR. CLINTON H. McKAY,
1006 Exchange Building,
Memphis, Tennessee,

Counsel for intervening defendants the Atchison,
Topeka & Santa Fe Railway Co., and others.

MR. W. E. DAVIS,
K. S. C. Building,
Kansas City, Missouri,

Counsel for intervening defendants the Atchison,
Topeka & Santa Fe Railway Co., and others.

.....
AUVERGNE WILLIAMS.

Subscribed and sworn to before me this day
of October, 1942.

[fol. 148] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 149] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S EXHIBIT No. 1

Before the Interstate Commerce Commission

PETITION FOR SUSPENSION OF ELIMINATION OF LOADING CHARGES ON COTTON FROM OKLAHOMA TO GULF PORTS, LAKE CHARLES, LOUISIANA, AND WEST

To the Interstate Commerce Commission:

Now comes L. T. Barringer and Company and respectfully requests that the Commission suspend and enter into an investigation concerning the lawfulness of a proposed elimination of charges for the loading by the carriers of cotton shipments, as published in the exception contained in Item 325-A of Supplement No. 15 to Southwestern Lines' Tariff No. 237-E, Agent J. R. Peel's I. C. C. No. 3307, and in Item 121 of Supplement No. 5 to Southwestern Lines' Tariff No. 208-G, Agents J. R. Peel's I. C. C. No. 3370, both items being published to become effective June 11, 1941, and in support of its request respectfully states:

I

L. T. Barringer and Company is a corporation engaged in the merchandising of cotton with its principal office and place of business at Memphis, Tennessee. It buys cotton in substantial volume at gin origins and at compress points in Oklahoma which it resells to domestic mills in the southeast and the Carolinas, shipments from compress points being in carload quantities. It purchases such cotton in competition with many other merchants, including those who ship to gulf ports, Lake Charles, and west.

II

Under present tariffs (Item 325 in Southwestern Lines' Tariff No. 237-E and Item 120 in Southwestern Lines' Tariff No. 208-G), cotton which is loaded by carriers at points of origin after tender on carrier's depot or cotton

platform, and which moves into concentration points on [fol. 150] floating-in rates, is subject to, a loading charge of $5\frac{1}{2}$ cents per square bale and $2\frac{3}{4}$ cents per round bale, when reshipped from concentrating points under earload rates or when shipped under the deferred shipment rule (Item 200 in Southwestern Lines' Tariff No. 208-G) to New Orleans, Louisiana, Lake Charles, Louisiana, or the Texas gulf ports. These loading charges are in addition to the through rate and ordinarily are collected when the through charges from first origin to final destination are readjusted on a transit basis under the provisions of Item 220 of Southwestern Lines' Tariff No. 237-E. (See *Cotton Loading Provisions in the Southwest*, 220 I. C. C. 702)

In past seasons, 15 to 20 per cent of the cotton purchased by L. T. Barringer and Company in Oklahoma has been subject to this loading charge, and in the purchase of such cotton it has been necessary to take such loading charges into consideration.

In the supplement of which suspension is here sought, the A. T. & S. E., G. C. & S. F., P. & S. F., and M-K-T propose to eliminate the charge at points served by them in Oklahoma, but *only* as to shipments destined to Beaumont, Corpus Christi, Galveston, Houston, Orange, Port Arthur, and Texas City, Texas, and Lake Charles, Louisiana. No such elimination of the loading charge is proposed as to cotton shipped on earload rates to other destinations and, consequently, cotton originating at these same Oklahoma points will continue to be subject to the loading charge when destined to domestic mills in the southeast and the Carolinas.

This means that carriers propose to perform a free service on cotton shipped to the Texas and Louisiana ports above named, while, at the same time, assessing a charge for an identical service if the cotton is shipped to other destinations. This will create an unjust advantage and [fol. 151] undue preference in favor of shippers who use such free services to the disadvantage of L. T. Barringer and Company in violation of Sections 2 and 3 of the Interstate Commerce Act.

Wherefore, petitioner requests that the Commission suspend and enter into an investigation concerning the lawfulness of a proposed elimination of charges for the loading of shipments for cotton when loaded by the carriers.

Respectfully submitted, L. T. Barringer and Company, Memphis, Tennessee, by John S. Burchmore, Nuel D. Belnap, Its Attorneys. Walter, Burchmore & Belnap, of Counsel, 2106 Field Building, Chicago, Illinois.

May 28, 1941.

Certificate of Service

I hereby certify that I have this day served the foregoing document by mail upon Agent J. R. Peel, 401 South 12th Blvd., St. Louis, Missouri.

Dated at Chicago, Illinois, this 28th day of May, 1941.

Nuel D. Belnap, of Counsel.

[fols. 152-153] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S EXHIBIT 2—Filed July 6, 1942

Interstate Commerce Commission

Washington

I, W. P. Bartel, Secretary of the Interstate Commerce Commission, do hereby certify that the attached are true copies of transcript of the stenographer's notes of the hearing held July 19, 1941 at New Orleans, La., and exhibits filed at said hearing, in Investigation and Suspension Dockets No. 4981, Loading Cotton in Oklahoma, and 4996, Loading Cotton on St. L. S. F. & T. Railway in Texas, the originals of which are now on file and of record in the office of said Commission.

In Witness Whereof I have hereunto set my hand and affixed the Seal of said Commission this 17th day of June, A. D. 1942.

W. P. Bartel, Secretary of the Interstate Commerce Commission. (Seal.)

[fol. 154] BEFORE THE INTERSTATE COMMERCE COMMISSION

I. & S. Docket No. 4981

LOADING COTTON IN OKLAHOMA

I. & S. Docket No. 4996

LOADING COTTON ON ST. L. S. F. & T. RAILWAY, IN TEXAS

Jung Hotel,
New Orleans, Louisiana,
July 19, 1941.

Met, pursuant to notice, at 9:00 o'clock a. m.

Before H. W. Archer, Examiner

Appearances:

H. C. Barron, 1211 Railway Exchange, Chicago, Illinois, appearing for Respondents in I. & S. Docket 4981 only.

J. G. Jay, 205 Santa Fe Bldg., Topeka, Kansas, and W. L. Veale, Amarillo, Texas, appearing for Santa Fe System Lines in I. & S. Docket No. 4981.

C. B. Bee, State Capitol, Oklahoma City, Oklahoma, appearing for Corporation Commission, State of Oklahoma, and producers and handlers of cotton in Oklahoma.

Harvey Allen, Katy Bldg., Dallas, Texas, appearing for Missouri Kansas Texas Railroad and Missouri Kansas Texas Railroad of Texas.

[fols. 155-157] B. F. Batts and W. G. Degelow, 508 Cotton Belt Bldg., St. Louis, Missouri, appearing for St. L. S. W. Railway Company.

A. G. Thaman, 1810 Missouri Pacific Bldg., St. Louis, Missouri, appearing for Missouri Pacific Railroad.

Alvin J. Baumann and M. N. Lallinger, 1025 Frisco Bldg., St. Louis, Missouri, appearing for Southwestern Lines not otherwise appearing.

T. M. Savary, Second and McLean Street, Little Rock, Ark., appearing for C. R. I. & P. Railway (Frank O. Lowden, James E. Gorman, Joseph B. Fleming, Trustees).

Nuel D. Belnap, 2106 Field Bldg., Chicago, Illinois, appearing for L. T. Barringer & Co., protestant in I. & S. Docket 4981.

F. M. Graves, 66 S. Front, Memphis, Tennessee, appearing for L. T. Barringer & Co.

P. H. Johansen, Mills Building, Washington, D. C., appearing for Cannon Mills Company.

Alonzo Bennett, 81 Monroe Avenue, Memphis, Tennessee, appearing for Mississippi Valley Interior Cotton Compress & Cotton Warehouse Association and Federal Compress & Warehouse Company, Memphis, Tennessee.

Haskell Donoho and Halsey McGovern, U. S. Dept. of Agriculture, Washington, D. C., appearing for U. S. Department of Agriculture.

C. A. Mitchell and E. H. Thornton, 310 Board of Trade Annex, New Orleans, Louisiana, appearing for New Orleans Joint Traffic Bureau.

[fol. 158]

PROCEEDINGS

Examiner Archer: Gentlemen, the Interstate Commerce Commission has set for hearing at this time and place Investigation and Suspension Docket No. 4981, Loading Cotton in Oklahoma; and also Investigation and Suspension Docket No. 4996, Loading Cotton on the St. Louis, San Francisco & Texas Railway in Texas.

I presume these cases will be heard on a joint record?

Mr. Baumann: There is no objection so far as the Frisco is concerned.

Examiner Archer: Who appears for the respondents?

Mr. Baumann: A. J. Baumann, 1025 Frisco Building, St. Louis, Missouri, appearing for the respondents in I. & S. Docket No. 4996 and appearing for protestants in I. & S. Docket No. 4981.

Mr. Jay: H. C. Barron, 1211 Railway Exchange Building, Chicago, Illinois, J. G. Jay, 205 Santa Fe Building, Topeka, Kansas, and W. L. Veale, care of Santa Fe Railroad, Amarillo, Texas, appearing for Santa Fe System Lines in I. & S. Docket No. 4981 only.

Examiner Archer: Respondents in both proceedings?

Mr. Jay: Only for the respondents in I. & S. Docket No. 4981, Mr. Examiner.

Mr. Allen: Harvey Allen, Katy Building, Dallas, Texas, appearing for Missouri Kansas and Texas Railroad and Missouri Kansas Texas Railroad of Texas, respondents in I. & S. Docket 4981.

[fol. 159] Mr. Veale: W. L. Veale, Chief Tariff Clerk, The Pan Handle & Santa Fe Railway Company, Amarillo, Texas, appearing for The Pan Handle & Santa Fe Railway Company and the Santa Fe System Lines in I. & S. Docket 4981.

Examiner Archer: Any other respondents?

(No response.)

Mr. Donoho: Haskell Donoho, appearing for the United States Department of Agriculture.

Mr. Batts: B. F. Batts and W. G. Degelow, 508 Cotton Belt Building, St. Louis, Missouri, appearing for St. Louis Southwestern Railway Lines; we are a technical respondent, I believe, in I. & S. Docket No. 4996, but our position will be more definitely and in detail stated by the witness when he appears with his testimony.

Examiner Archer: Any other respondents?

(No response.)

Examiner Archer: Any interests appearing in behalf of the respondents?

Mr. Bee: C. B. Bee, State Capitol, Oklahoma City, Oklahoma, representing the Corporation Commission, State of Oklahoma, as our interests may appear. Now, we desire the decision of the Commission, in calling for uniformity, we feel that the charges should be removed, but our primary interest is uniformity in the two states; we could follow either proceeding but they are contradictory as they are under the suspension.

[fol. 160] Examiner Archer: Any other interests appearing in behalf of the respondents?

Mr. Savary: T. M. Savary, Assistant General Freight Agent, Chicago, Rock Island & Pacific Railway, appearing as our interests may arise.

Mr. Thaman: A. G. Thaman, 1810 Missouri Pacific Building, St. Louis, Missouri, appearing as our interests may arise, and also in opposition to the removal of the charge in Oklahoma as will be explained in detail in our presentation.

Examiner Archer: Who appears for the protestants?

Mr. Belnap: Nuel D. Belnap and F. M. Graves; appearing for L. T. Barringer & Company, protestant in I. & S. Docket No. 4981.

Mr. Johansen: P. H. Johansen, Mills Building, Washington, D. C., appearing for Cannon Mills Company, Kannapolis, North Carolina, protestant in I. & S. Docket No. 4981.

Mr. Mitchell: E. H. Thornton and C. A. Mitchell, 310 Board of Trade Annex, New Orleans, Louisiana, appearing for New Orleans Joint Traffic Bureau, protestant in I. & S. Docket No. 4981.

Examiner Archer: Any other protestants?

(No response.)

Examiner Archer: Apparently not. Who is to receive the free copy of the testimony for the respondents?

Mr. Jay: R. S. Outlaw, general counsel, Atchison, Topeka & Santa Fe Railway, Railway Exchange Building, Chicago, Illinois.

Examiner Archer: And who for the protestants?

[fol. 161] Mr. Belnap: Nuel D. Belnap.

Examiner Archer: The respondents may call their first witness.

Mr. Baumann: Not in I. & S. 4996?

Mr. Belnap: In the first docket.

Examiner Archer: Will someone kindly state the issues in I. & S. Docket No. 4981? Who is the principal respondent in I. & S. Docket No. 4981?

Mr. Jay: The issues involved in Investigation and Suspension Docket No. 4981 would be whether the rule for performing free loading of cotton tendered at the carriers depot or cotton platform as published in Items 120-A and 121-A, Agent J. R. Peel's I. C. C. 3370 and Item 325-B, Agent J. R. Peel's I. C. C. No. 3307 as published for account of the A. T. & S. F., the Gulf, Colorado & Santa Fe Railway, The Panhandle & Santa Fe Railway Company, the M. K. & T. Railroad Company, the Kansas City Southern Railway Company and the Oklahoma Railway Company on shipments from Oklahoma to Texas Gulf ports and Lake Charles, Louisiana, shall be permitted to become effective as published.

Examiner Archer: These are cancellations of the loading charges?

Mr. Jay: They are cancellations of charges for loading as now provided in Item 120 of Agent J. R. Peel's I. C. C. 3370.

Examiner Archer: Will someone state the issues in Investigation and Suspension Docket No. 4996, briefly, please? [fol. 162] **Mr. Baumann:** The issues in I. & S. Docket No. 4996 are similar to those in Investigation and Suspension Docket No. 4981 and involve the reestablishment of a similar loading charge as that involved in Investigation and Suspension Docket No. 4981 affecting the St. Louis, San Francisco & Texas Railway in Texas.

Examiner Archer: As I understand, in I. & S. Docket No. 4981 there is involved the cancellation of that loading charge and in I. & S. Docket No. 4996 is involved the reestablishment of a loading charge, is that correct?

Mr. Baumann: Yes sir.

Examiner Archer: We will proceed with the respondents in Investigation & Suspension Docket No. 4981 first. Call your first witness.

J. G. JAY, being first duly sworn, testified as follows:

Direct examination.

By Mr. Barron:

Q. Will you please state your name, address and occupation for the record, Mr. Jay?

A. My name is J. G. Jay; I am assistant chief rate clerk for The Atchison, Topeka & Santa Fe Railway Company, with headquarters at Topeka, Kansas. I have been in the employ of the Santa Fe Railway and in railroad freight traffic work since 1918.

I have represented my company in various proceedings before the Interstate Commerce Commission and am employed in the making of freight rates, rules and regulations.

Q. You are familiar with the issues involved in this proceeding?

A. Yes sir.

Q. You have some testimony that you desire to present?

A. Yes sir.

Q. Will you please proceed, Mr. Jay?

A. This proceeding involves the issue as to whether the provisions of Items 120-A and 121-A, Agent J. R. Peel's I. C. C. 3370 and Item 325-B, Agent J. R. Peel's I. C. C. 3307 shall be permitted to become effective. These tariff

items contemplate that cotton will be loaded by, or at the expense of the carrier at stations in Oklahoma when tendered to the carrier at origin on its depot or cotton platform, and are published for application by Santa Fe Railway Lines and by the Missouri-Kansas-Texas Railroad Company, The Kansas City Southern Railway Company and Oklahoma Railway Company on shipments to Texas gulf ports or Lake Charles, Louisiana.

Publication of this rule for application at Oklahoma stations follows establishment of similar rule at stations in Texas, effective October 15, 1939, in Item 40-A, Supplement 4 to Texas-Louisiana Lines' Tariff 71-E, Agent Ira D. Dodge's I. C. C. 480, and this action was brought about due to truck competition.

While the suspended rule has to do only with the terminal [fol. 164] service of loading cotton, some information about the nature of the existing rates is pertinent.

Prior to the inception of carload rates on cotton, all such traffic moved on so-called "any quantity" rates. Such rates being of a less than carload character, the carriers performed free loading even though they commonly received shipments on a single bill of lading aggregating as much as a carload and often more than could be loaded into one car.

On August 7, 1933, Southwestern carriers instituted a system of carload rates on cotton which were designed to meet the increasing competition of unregulated motor trucks. These so-called carload rates were and are in the nature of "any quantity" rates in that they provide for the accumulation of small lots of cotton into carloads. These rate schedules were made applicable in connection with certain minima, which tended to encourage the heavy loading of cars, recognizing the principle later recited in the Commission's Report in 208 I. C. C. 691, where it stated:

"What the railroads are or should be seeking is to engage in the transportation of cotton under an arrangement which will net them the greatest possible revenue out of the depressed rates which the competition compels them to charge."

While movement under the carload system of rates, since its establishment, has largely superseded the movement under less than carload rates, there is still a portion of the

[fol. 165] traffic moved in less than carloads at rates, which to the Gulf Ports have been reduced for the purpose of meeting competition of motor trucks to the figures shown on Pages 169 and 170 of SWL Tariff 176-C, Agent J. R. Peel's I. C. C. 3139, and similar rates published from Texas origins in Texas-Louisiana Lines' Tariff 59-C, Agent Ira D. Dodge's I. C. C. 520. The actual handling of cotton by rail when at less than carload or any quantity rates is very similar to that when moved in carloads. To illustrate, cotton moving under any quantity rates may be handled in the several following methods:

A—Cotton may originate at so-called "country" origins and move through billing to ultimate destination without an intermediate stop for transit. This cotton may be either uncompressed or compressed, which in the latter instance is usually round bale cotton.

B—Cotton may originate at so-called "country" origins and move to ultimate destination under through billing, being temporarily stopped at an intermediate compress station where it may receive the services afforded by a compress.

C—Cotton may originate at so-called "country" origins and be consigned to a station at which is located a compress, charges being assessed upon basis of the full local rate or so-called "Transit" rates from origin to such transit station.

Subsequently, and within the time limit authorized by tariff for transit privileges, cotton may be reshipped to its [fol. 166] final destination, charges being assessed upon basis of the full local rate from transit point to destination. Upon presentation of the inbound freight bill and outbound bill of lading, charges will be readjusted by carriers to the basis of the lawful through rate applicable from origin to destination via the transit station.

D—Cotton may originate at stations at which compresses are located and when tendered upon the carriers' facilities, either depot or cotton platform, it may be transported in exactly the same fashion as shipments which originate at "country" origins.

Under all of the above methods of handling any quantity shipments, the carriers will perform loading from their fa-

ilities, either depot or cotton platform, into the cars, for which they receive no remuneration in addition to the lawful through rate.

Carload rates were designed to apply on shipments which might be tendered in straight carloads or on shipments which were to be assembled with other shipments at compress points or at origins at which compresses are not located, so that under the rules governing the application of carload rates it is possible for cotton to be handled in the following methods:

A—Cotton may originate at so-called "country" origins and move under through billing to ultimate destination without an intermediate stop for transit; such cotton may be [fol. 167] either uncompressed or compressed and shipments may move either as a single carload consignment or as several small consignments on separate bills of lading, pooled by shippers so as to attain the highest possible minimum loading requirement to obtain the benefit of the rate applicable in connection with that particular minimum weight.

B—Cotton may originate at so-called "country" origins and move to ultimate destination under through billing, being temporarily stopped at an intermediate compress station to afford it services offered by a compress and to permit its consolidation with other shipments so as to attain the highest possible minimum loading requirement to obtain the benefit of the rate applicable in connection with that particular minimum weight. Straight carload shipments originating at "country" origins in an uncompressed condition may likewise be stopped for the same purpose. The above privilege is available on traffic to Gulf Ports, but not to Southern or Eastern Destinations.

C—Cotton may originate at so-called "country" origins and be consigned to a station at which is located a compress, charges being assessed upon basis of the full local rate or so-called inbound "transit rates" from origin to such transit station. Subsequently and within the time limit authorized by tariff for transit privileges, cotton may be reshipped to its final destination, charges being assessed [fol. 168] upon basis of the full local rate from transit point to destination. The inbound movement may be either straight carloads or less than carloads. Upon presentation

of the inbound freight bill or freight bills and outbound bill of lading, charges will be readjusted by carriers to the basis of the lawful through rate from origin to destination via the transit station applicable in connection with the minimum weight of the outbound shipment from transit station.

D—Cotton may originate at stations at which compresses are located and when tendered upon carriers' facilities, either depot or cotton platform, will be transported in exactly the same fashion as shipments which originate at "country" origins.

For all practical purposes the transportation of cotton under the so-called carload rates is identical with the transportation of cotton under the any quantity rates, with the exception that:

a—Carriers perform a loading service at initial origin on all cotton tendered them at their depot or on their cotton platform when shipments are moving under any quantity rates; whereas when shipments moving under so-called carload rates the cotton must be loaded by the shipper or at his expense (with the exception of cotton originating in Texas a free loading rule has been established effective October 15, 1939.

b—Under the any quantity system of rates, the compress [fol. 169] acts as the agent of the carrier on cotton stopped enroute for transit and the carrier collects, along with its rate, the charge assessed by the compress company; whereas under the carload system of rates the compress is not the agent of carrier and the charges assessed by the compress company must be paid directly to the compress company by the shippers or owners of the cotton; This conclusion is substantiated by the following found in 208 I. C. C. 684:

Mr. Belnap: Is it necessary to read from a decision of the Commission?

Examiner Archer: I don't think so. Can't you designate the paragraphs, or the page from which the quotation is taken?

Mr. Belnap: It seems to me that the page reference is sufficient.

Examiner Archer: Do you know the page of the decision?

The Witness: I will give reference to the page and the paragraph later on.

Examiner Archer: All right. Proceed.

The Witness: The above is presented to show the close analogy between the transportation of cotton under the any quantity and the carload rate adjustments and to direct attention of the commission to the fact that in the matter of these loading charges, respondent carriers are simply preserving the analogy.

When the carload system of rates was initially established, and for several years thereafter, the carriers re- [fol. 170] quired loading to be performed by shippers on traffic moving under such rates, or where loading was performed by carriers a charge of 5 cents per square bale, and $2\frac{1}{2}$ cents per round bale (increased under Ex Parte 123 to $5\frac{1}{2}$ cents and $2\frac{3}{4}$ cents, respectively) was assessed. This for the reason already enunciated that they were endeavoring to maintain such carload rates under an arrangement which would net them the greatest possible revenue out of the depressed rates which the competition compelled them to charge. For a period of time the carload system of rates maintained by the carriers was successful in meeting truck competition.

Then the trucking of cotton to Texas gulf ports became more prevalent and this tendency grew until during the 1938-1939 season the Oklahoma and Texas lines found it necessary to take some action to combat it. The carriers' analysis at that time showed that the great majority of truck tonnage to the Gulf Ports was from Texas origins, and since a later witness is to explain the conditions prevailing in Texas at that time, and our experience in the operation of the loading charge rule in Texas since its establishment, I will here only refer to the Texas situation as it is necessary to discuss conditions in Oklahoma. This analysis, however, did show that trucking of cotton was spreading to the Oklahoma producing territory at a rate which would bear close watch so that our interests would be protected. A study prepared of the cotton receipts at [fol. 171] Houston by the Houston Port & Traffic Bureau for a period August 1, 1939, to February 1, 1940, and submitted to the rail carriers at a public hearing before a joint meeting of the Texas and Southwestern lines in April, 1940, showed that there had been trucked from 26 counties in Oklahoma to Houston 10,372 square bales (which included both flat

and compressed cotton) and 8,374 round bales. The heavier trucking was from counties south of the line of the Rock Island running through Howe, McAlester, Oklahoma City and Clinton, Oklahoma.

In addition to trucking from producing areas to Texas Gulf Ports there was a tremendous increase in the trucking from country stations to compress points. That carriers have been heretofore confronted with this tendency will be seen from the Commission's observation reported in 208 I. C. C. 695: ▾

" . . . most of the railroads concerned are apprehensive, and apparently with good reason, that once the cotton is on a truck it may be carried by the truck all the way to a port or at least to a railroad junction point from which it could be moved out over a railroad other than the one along whose line it originated, thus depriving the latter of any haul thereon."

The carriers gave considerable study to the reasons for the increased movement by motor truck and found, among other things, that the loading charge was considered a nuisance by cotton producers and shippers alike and in a measure [fol. 172] ure was responsible for the diversion of this traffic to trucks. This was not only true of the movement direct to the ports, but in many instances cotton at interior gin points was being moved by truck to compress points, rather than to the logical and normal rail loading stations in order that the charge could be avoided. Further, the cotton was trucked from the limits of rail stations to compress points to escape the payment of the loading charge or to avoid the necessity of performing the loading service.

Growing out of our investigation at that time proposals were submitted on the public docket in both the Texas-Louisiana and the Southwestern Freight Bureau to perform free loading of cotton when tendered to carrier on its depot or cotton platform. The proposal for application at Texas stations also Louisiana stations included in Agent Dodge's I. C. C. 480 (reissued by his I. C. C. 507) was approved. As to the Southwestern Freight Bureau proposal, while shipping interests were generally favorable to the proposed rule, some of the interested lines felt it would not be to their advantage to establish it, and the proposal was disapproved.

There was also under consideration at that time a reduc-

tion in the through rates for the purpose of more adequately meeting truck competition which revision was accomplished on June 20, 1940, in Supplement 14 to Agent J. R. Peel's I. C. C. 3202 and Texas-Louisiana Lines Tariff 71-F, Agent Ira D. Dodge's I. C. C. 507. Because it was [fol. 173] desired to determine the extent to which reduced rates were effective in combating the movement of cotton by truck from Oklahoma origins also because of opposition to the loading charge rule from some of the interested rail carriers no further action was taken at that time as to establishment of the loading charge rule at points in Oklahoma.

While these rate reductions were helpful they have not entirely satisfied Oklahoma shippers, and we have had constant complaints and threats of loss of traffic from Oklahoma origins because of failure to remove the loading charge from such origins to the same extent that it had been removed from Texas shipping points.

The investigation made by carriers which is above referred to showed trucking of cotton from Oklahoma origins is different in some respects from the movement via truck from Texas origins in that there is not such a large volume trucked through to the Gulf Ports, the largest truck movement being from gin stations to compress points. I do not have information covering the entire state or for account of all lines, but have prepared some information about the movement from counties served by the Santa Fe in Oklahoma both by rail over our line and by truck.

In the 25 counties in which there is cotton production served by the Santa Fe in Oklahoma, for the seasons August 1, 1939, to July 31, 1940, there were 207,863 bales ginned, which information is taken from reports of the Department of Commerce, Bureau of Census.

[fol. 174] During these seasons, there was handled to compress points by the Santa Fe, 27,758 bales, and through from gin points to an interstate destination, 18,179 bales or a total of 45,937 bales, which is 22.1 per cent of the bales ginned.

The balance of this cotton was handled either by other lines, other rail carriers, or by motor truck.

For the season August 1, 1940 to June 30, 1941, which is the latest date for which we could obtain figures, there were 312,514 bales ginned.

The Santa Fe handled, by rail, to compress stations, 47,522 bales, and through from gin points to an interstate destination, 15,352 bales, or a total of 62,874 bales which is 20.1 per cent of the bales ginned. The remainder of total bales ginned were handled by other rail carriers or by motor truck.

Mr. Belnap: Are you going to have an exhibit on these figures?

The Witness: No; I started to prepare an exhibit, but there was some of my information that was a little bit incomplete, and I didn't do it. I have a statement prepared, but I don't intend to enter it as an exhibit.

Mr. Belnap: I thought figures of that character, if in tabular form, would be so much more convenient to the parties, if in tabular form, from which the witness is now reading, and if it could be prepared in that manner and [fol. 175] distributed, it would be much more convenient, it seems to me.

The Witness: I can give you that information in a statement.

Examiner Archer: Off the record.

(Discussion had off the record.)

The Witness: I have prepared an exhibit showing the movement of cotton by the Santa Fe Lines from compress or warehousing stations in Oklahoma for the above seasons, which I introduce as my Exhibit No. 1.

(Exhibit No. 1, Witness Jay, marked for identification.)

By Mr. Barron:

Q. Will you please proceed, Mr. Jay?

A. By referring to this exhibit, for example, in the seasons August 1, 1940 to June 30, 1941, our outbound movement was 83,098 bales when compared with the number of bales handled into compress stations by rail 47,522 bales, which leaves a total of 35,573 bales greater movement by rail from compress than by rail into the compress.

Mr. Bee: That is called city or free cotton?

The Witness: Such cotton is referred to as city or free cotton.

The Santa Fe serves ten compress or warehousing stations in Oklahoma.

By Mr. Barron:

Q. These are at the points shown on your Exhibit No. 1? [fol. 176] A. That is correct. At which, or in the, near vicinity are located numerous gins, so there normally is a large amount of local or city or free cotton.

Mr. Belnap: Is this exhibit limited to the movement originating on the Santa Fe Railroad?

The Witness: That is right.

I have also made an investigation all through the season of the movement by truck both from our compress and warehouse points and also from gin points served by the Santa Fe.

Mr. Baumgart: In what states?

The Witness: In the state of Oklahoma.

By Mr. Barron:

Q. Proceed, please, sir.

A. For the seasons 1939-40, there were 22,163 bales moved by truck from compress stations in Oklahoma. This figure is incomplete because it was obtained from or through the compresses, some of whom refused to give us that information or let us have access to their records showing such information.

Mr. Belnap: What is the destination of that 22,000 bales?

The Witness: That figure was from Altus, Chickasha.

Mr. Bee: At Chickasha, or just one compress?

The Witness: The total figure was for Altus, Chickasha, Clinton and Pauls Valley.

Mr. Belnap: You had to cover all compresses at those points?

The Witness: All compresses at those points.

Mr. Belnap: Both compresses at Chickasha, the Traders [fol. 177] and Joy's?

The Witness: Yes, sir.

Mr. Bee: Off the record.

(Discussion had off the record.)

The Witness: It is not possible to determine the destination of all the cotton that was trucked from the compress points, but our auditing department sends a representative for a check of the shippers' records, which includes com-

press records, which is made periodically during the season and I have had our representative to watch the destination where he could obtain the information as to the truck movement; and most of the truck movements from Oklahoma compress points are to Texas Gulf ports or Texas mill points, that is textile mill points.

That is not true of the truck movements from gin stations. Some of the truck movements from gin stations will go to Texas ports or a Texas destination, but the majority of it is to compress or warehousing points in Oklahoma, and some to the textile mill at Sand Springs, Oklahoma, and I believe a similar consumption is at McAlester, Oklahoma.

By Mr. Barron:

Q. Do you have any definite figures as to the percentage moving to the Texas Gulf ports?

A. No, sir; the only thing I have is the Santa Fe rail movement from these compress points, but as compared with that figure of 22,163 bales by truck, the Santa Fe [fol. 178] handled 21,179 bales during the same season, or less than was handled by truck.

That is significant when you take into consideration the area in Oklahoma served by the Santa Fe and our direct route to Galveston and Houston.

Examiner Archer: Are those truck movements from the same origins?

The Witness: From the same origins.

Mr. Bee: You haven't got all the truck movements from all the origins that you have the rail movements,—you only had four truck movements where you had ten rail movements, isn't that correct?

The Witness: For this comparison, I took the rail movement from those same four compress destinations.

For the 1940-41 season, the movement by truck was much smaller from the compress points, 6,691 bales; also the rail movement was less to the Texas Gulf ports for the past season, and the Santa Fe handled from those same compress stations 2,653 bales, or a little more than one third of what was handled by truck.

Mr. Belnap: Now, Mr. Jay, so that I may follow you: The first time that you gave the total for the four compress points, total bales by the Santa Fe, you gave it to all destinations, did you not?

The Witness: By the Santa Fe?

Mr. Belnap: Or did you confine it to the Texas ports and [fol. 179] Lake Charles?

The Witness: The rail movement by the Santa Fe is taken from this exhibit which was distributed.

Examiner Archer: Exhibit No. 1.

The Witness: And it shows the movement segregated to the ports, to New Orleans, and SFA Territory and so forth.

Mr. Belnap: When you gave a figure to compare to the truck movement to unknown destinations, the figures that you gave for comparison for the rail movement was to the Texas ports.

The Witness: That is correct, and the reason for it is because we have naturally conferred with our shippers who were using truck transportation to try to find out why we couldn't serve them more, and one of them, who is a large shipper, and who operates at least 20 gins in the state and is a cotton buyer and dealer, just frankly told us that he didn't like the loading charge and he wanted a further reduction in rates.

That was before our rate reductions were made about a year ago, and we didn't reduce the rates quite as low as he was asking us to do, and we have observed that there is still a truck movement from his shipping points.

Mr. Belnap: Now, you are talking about gin points, or are you talking about that shipper?

The Witness: That shipper happens to be located at a compress point even though he does operate a number of [fol. 180] gins and he uses his compress points for concentrating his cotton. Is that clear?

Mr. Belnap: It is not clear to me because you have been talking about a truck movement from compress points, and I assume that you mean out of the compresses themselves at these points.

The Witness: That is right.

Mr. Belnap: That is what you have been talking about?

The Witness: Yes.

Mr. Belnap: And now you refer to a shipper whom you say is an operator of gins and who wants lower rates, otherwise he will ship by truck, and then did you say that you had observed that this shipper did continue to ship by truck?

The Witness: Yes, sir. For example, he is located at Chickasha, Oklahoma; he concentrates his cotton quite a

bit at Chickasha, Oklahoma from his various gins, and from Chickasha we still have a large movement by truck so that we know that he is not entirely satisfied yet.

Mr. Belnap: Of this 6,690 bales in the cotton season which is just about to be finished, how much of that is from Chickasha?

The Witness: 3,733.

Mr. Belnap: Bales?

The Witness: Bales.

Mr. Belnap: To what destinations?

[fol. 181] The Witness: As I explained, by truck, we don't have any definite way of determining the destinations, but our investigation has indicated that the largest volume of it is to the Texas ports or to the Texas mill points.

Examiner Archer: Mr. Belnap has raised another question in my mind about this prior season: They trucked 22,163 bales; you don't know to just what destinations those bales went, or those shipments.

The Witness: My answer there would be the same for both seasons.

Examiner Archer: That is all I want. What about the rail shipment of 21,179—where did that go?

The Witness: That went to the Texas Gulf ports as shown on Exhibit No. 1.

Examiner Archer: That's all I want.

The Witness: My reason for comparing this truck movement with the rail movement to the Texas Gulf ports is because there is no incentive for trucking from compress points, no reason for trucking from a compress point except to a market place, like a textile mill or a port or something like that, but from your gin stations, they truck the cotton into the concentration points, compress points, even though some of it is trucked through to a market or a port. And we know there is no trucking from Oklahoma to Memphis, Tennessee or to the southeast, so the only thing that is left for us to compare our truck movement with the rail [fol. 182] movement is to the Texas ports or to Texas mill points.

Mr. Belnap: All of these truck figures that you have been giving in the last 15 or 20 minutes is trucking out of a compress and not out of a gin?

The Witness: That is right.

Mr. Belnap: Is your proposal to perform the loading at the compress points without charge?

The Witness: No, it is not.

Mr. Belnap: The shipper is still going to have to load that?

The Witness: The compress performs the loading at the compress points and his compress charge includes a factor for loading the cotton into the railway car.

Mr. Bee: He is doing it for the shipper, you mean?

The Witness: Yes, sir, as I mentioned before, under the carload system of rates, the compress is not the agent of the carrier and the shipper or the owner of the cotton must make their own arrangements and make their payments direct to the compress company, and that charge includes a factor for the loading of the cotton, as well as the insurance and the compression and so forth.

Examiner Archer: That raises a question in my mind; you are not eliminating your loading charge at compress points?

The Witness: I am very glad that you asked me that question, [fol. 183] because I didn't state it entirely clear, I am afraid: The rule would be broad enough that we will load the cotton at any station where the cotton is tendered to us on our depot or cotton platform, so we will do that at a compress station, but if the cotton is already in a compress, we have rail facilities up to the compress platform, and it is more economical for them to load it into the car at the compress platform, and they wouldn't bring it to us if the cotton has gone into the compress already.

Examiner Archer: If you are eliminating your loading charge at the compress point—and are you?

The Witness: We are.

Examiner Archer: And it is not loaded—

Mr. Belnap: I think that answer is ambiguous, because you say a compress point; a compress itself means one thing, and if you mean the station at which a compress is located, then that is another thing.

Mr. Bee: Let's take a non-compress point.

Examiner Archer: No, I want to ask it at a compress point, because his showing is from compress points, but he is eliminating the charge, to get back from truck shipments, but if this elimination of the loading charge is not going to have any effect at the compress points, I want to know that or want to get it clear in the record as to what effect it is going to have.

[fol. 184] The Witness: We can't stop right there, Mr. Examiner, because, in connection with cotton we give transit privileges and protect the through rate from the local gin origin to your final destination where we concentrate the cotton at the compress. In other words, as to the out-bound movement, he can get his charges that he has paid into the compress refunded by filing a claim and retain protection on a through rate from point of origin and every rate or rule or regulation which we can make available to the shipper which will encourage him to give us his cotton at the origin station, let us haul it into the compress point and then on out to destination, we will have a freight bill behind the cotton when it comes into the compress point which is of value to him to get a refund, and that is what we want to do, and stop the trucking into the compress points as much as possible.

Mr. Belnap: Is that the main purpose of this proposal?

The Witness: Yes; which leads up to the next information that I am going to give.

Mr. Barron: Are you clear now, Mr. Examiner, as to your question? Have you got the answer?

Examiner Archer: Not entirely.

Mr. Barron: Can you, for the examiner, explain clearly what you mean by the elimination of the loading charge at compress points? Take a compress point where it is not adjacent to the platform and where the cotton is delivered [fol. 185] from the compress point to the railroad loading platform.

The Witness: I gave you an illustration on two classes of traffic, the first is the free cotton that has no rail freight bill behind it, and the bill of lading is tendered to us at the compress station. In that case, if the cotton is tendered to us on our depot or cotton platform, we will perform the loading without charge.

Mr. Belnap: You propose to?

The Witness: That is what we propose to do. If the cotton has already gone into a compress and is loaded into the car off of the compress cotton platform, we would not perform the loading; that is one character of shipment. Then the other character of shipment is what we call the rail haul, that is the cotton that is moved into the compress station by rail and has a transit station behind it. We would perform the loading of that cotton at the gin point.

Examiner Archer: That is the origin?

The Witness: That is the origin, yes, sir, and after it has gone into the compress, we would again perform the loading if they would bring it over and give it to us on our depot platform, but not when loaded at the compress.

Mr. Barron: That is the same rule as in force in Texas.

The Witness: Yes, sir, that is the same rule as in force in Texas.

Mr. Bee: Let's go back to a country station and assume a [fol. 186] gin has a private track into its property,—you do not do the loading of that cotton, do you?

The Witness: That is the same as over the compress.

Mr. Bee: But if it is brought to your facilities, the station, even your own loading platform or your depot, then you do the loading and charge for it?

The Witness: That is correct. Your illustration there about having trackage to the gin leads me to make this statement: That in the state of Oklahoma, we do not have a single gin that is served with rail facilities. Some of them may be a hundred yards from our depot or cotton platform; some of them a block or eight blocks or two or three miles, which makes it necessary for them to put the cotton in a truck in order to get it over to our cotton platform. Then, if they have to perform the loading, which is labor cost if it has to be double tiered in the car, or it is cost to them if we perform the loading,—rather than go to that cost, so many of them are trucking direct to the compress and loading on the compress platform which makes our cotton free cotton at a common point served by other lines and subject to reshipment by the carriers.

Mr. Belnap: Going back to that situation at a station on your line at which a compress is located: Is it conceivable that after cotton gets into a compress, whether it came there by truck or by rail, that it would ever be taken out of [fol. 187] the compress and brought over to your cotton platform and there tendered you at that station?

The Witness: We don't expect that it would be, and we have not had any experience like that in Texas where the rule has been in effect.

The investigation which was made as to the movement of truck from gin stations is obtained by our local agents from the operators of the gins. It is not complete because some gins would not give us the information, but it was obtained each week or every two or three weeks all through the season. We kept our information up to date of June 30.

However, this information is only from gin stations served by the Atchison, Topeka & Santa Fé Railway in Oklahoma and for the season of 1940-41, there was a total of 35,197 bales moved by truck,—that is all in Oklahoma.

Mr. Thaman: Up to what date?

The Witness: Up to June 30. That was from gin stations at which there was no compress located, and the majority of those gin stations were local points to the AT&SF Railway, which means that there was at least 35,000 bales of our local cotton made available at common points for solicitation by other railroads,—another reason why we want to remove the loading charge so that we can encourage the receipt of this cotton at its normal billing stations.

Mr. Belnap: Did that all move to compress stations?

[fol. 188] The Witness: The gins did not give us the information as to destinations, but they frankly told us that most of it is to compress stations.

Mr. Belnap: At least 99 per cent of it?

The Witness: It is at least 90 per cent.

Mr. Belnap: Is it all moved to common point compresses?

The Witness: We only have one compress in Oklahoma that is strictly local to the Santa Fe.

Mr. Belnap: Which is that?

The Witness: Pauls Valley.

Our analysis of this truck movement from the various counties indicates that from some counties we are not bothered particularly, we are getting most of the cotton. And also I don't want to leave the impression that we think the assessment of a loading charge is the primary or the sale cause of trucking into compress points. It is not. We know that. There are other factors that cause the trucking from the ginning points to a compress points, but we have had complaints come to us continuously during the past two years that they wanted free loading of cotton and if they got it that we would have more cotton tendered to us at the gin points.

By Mr. Barron:

Q. In other words, you find this restriction is a contributing element anyhow to the trucking of cotton?

A. That is right.

I will only give an illustration of a few counties where [fol. 189] there was heavy trucking to show the loss or the

hazard of loss of this cotton by permitting it to move into a common point compress point with other lines.

Garvin County, in which is located a compress at Pauls Valley: All gin points in the county are local to the Santa Fe except one, Lindsay, Oklahoma. There was a total of 24,575 bales ginned. The Santa Fe handled 11,822 bales by rail to the compress and we handled 1,688 by rail to an interstate destination, making a total of 13,510 bales.

We have reported to us from gin stations a truck movement of 8,057 bales, and these are from gin stations other than compress points. That report is incomplete by reason of the fact that some gin points have not been able to make a report.

Jackson County, in which is located compresses at Altus, Oklahoma: There was a production of 26,644 bales. In this county, we have fewer local gin stations than some of the other lines, and, naturally, they would receive a large share of the total ginnings. But from the four gins that are located at local stations and three gins that are inland but adjacent to local billing points on our line, we only handled 44 bales by rail, and we have a record of 2,633 bales by truck.

Kiowa County, in which there is one compress located at Hobart, Oklahoma, not served by the Santa Fe, we have four gins served by the Santa Fe, and two at inland points adjacent to our line. There was a total of 21,591 bales [fol. 190] ginned. We handled by rail to compress 746 bales and we have a record from gin points of 10,814 bales moved by truck.

Examiner Archer: From the same gin points?

The Witness: From the same gin points.

Washita County, in which we have five local gins and four gins adjacent to our line, inland gins adjacent to our line, there was a total ginning of 25,864 bales of which the Santa Fe handled 5,042 bales either to compress or to an interstate destination. We have a record of 2,848 bales moved by truck from gin points.

Mr. Belnap: Is this detail that you give for trucks, does it come to the aggregate of 35,197?

The Witness: These are only four counties that I was giving an illustration to show how we were being hurt by the trucking from the local points, but it does not equal the total.

Mr. Belnap: But those figures go in to help make up this total of 35,197?

The Witness: Yes, sir.

Mr. Graves: Give me the name of the compress in Washita County.

The Witness: There is no compress in Washita County.

Mr. Bee: Do you happen to have Love County?

The Witness: I don't have the trucking for Love County.

Mr. Belnap: Again, that trucking was primarily to compresses at compress points?

[fol. 191] The Witness: That is correct.

Mr. Bee: You didn't say in Jackson County that it was primarily trucking to compress points. That might have been into Texas from Jackson County?

The Witness: Yes, from Jackson County, there is a strong possibility that some of the trucking from the gin points moved to a Texas mill point or to a Gulf port.

Mr. Bee: Or to Texas gin points?

The Witness: It is from a gin point,—do you mean a Texas compress point?

Mr. Bee: To a Texas compress point.

The Witness: There is very little probability of it moving to a Texas compress; the compress at Chillicothe, Texas has been closed.

In addition to the above conditions as to the trucking of cotton, the Oklahoma carriers have recently received a complaint from the Corporation Commission of Oklahoma claiming that we have failed to comply with Finding Eight of the Interstate Commerce Commission's decision in I. C. C. Docket 26235, 208 I. C. C. 695, by failing to establish free loading of cotton at Oklahoma origins to Texas Gulf ports including Lake Charles, Louisiana, to the same extent that the rule was established from Texas origins. There are differences of opinion among Southwestern lines as to whether the carriers are in contravention of the above finding, [fol. 192] inasmuch as free loading of cotton is a terminal service whereas the order in the above case seemingly runs against rate levels. However, it might be contended that Finding 8 runs against the total charge assessed for the transportation service including the loading in railroad cars. It can be said that the rule now under suspension is at least in harmony with the spirit of Finding 8, I. C. C.

Docket 26235, and our line at least is agreeable to removing the complaint by establishing the proposed rule.

By Mr. Barron:

Q. Did the carriers me a petition with the Interstate Commerce Commission asking that Finding 8 be eliminated from the decision?

A. Yes, sir.

Q. And what happened to it?

A. It was denied.

Q. And after the denial, the Santa Fe attempted to put in the same arrangements in Oklahoma as are presently in effect in Texas?

A. Yes, sir.

Q. Is there any difference in the proposed rule in Oklahoma as we now have in effect in Texas?

A. No, sir, it is worded identically.

Mr. Mitchell: Does that mean as to its application, does it apply to the same destinations?

Mr. Barron: I didn't ask him that.

Mr. Mitchell: Then it is different, there is the difference.

[fol. 193] Mr. Barron: No, not in the rule, but in the territorial application there might be some difference.

By Mr. Barron:

Q. Does that complete your statement?

A. Yes.

Mr. Barron: I now offer Exhibit No. 1 of witness Jay and ask that it be received in evidence, Mr. Examiner.

Examiner Archer: If there is no objection it will be received in evidence.

(Exhibit No. 1, witness Jay, received in evidence.)

Examiner Archer: We will recess for ten minutes.

(Short recess.)

Examiner Archer: We will proceed, gentlemen.

Mr. Donoho: I wish to state at this time that Mr. Halsey McGovern of the United States Department of Agriculture is appearing here on behalf of the Secretary.

Examiner Archer: I presume that his address is Washington?

Mr. Donovan: Washington, D. C.

Examiner Archer: Is the witness ready for cross examination?

Mr. Barron: I have just a few more questions before turning him over for cross examination, Mr. Examiner.

Examiner Archer: Very well.

By Mr. Barron:

Q. Mr. Jay, would you state for the record the territorial application of the rules under suspension in this proceeding?

A. They are proposed to apply from stations in Oklahoma on the lines I mentioned in my previous direct testimony on traffic to Texas Gulf ports and Lake Charles, Louisiana.

Q. And it will not apply so far as the rules under suspension to any other territory?

A. That is right.

Q. What is the position of the Santa Fe System Lines as to the application of the rules to other territory?

A. We would have no objection to performing the same free loading to all destinations.

Q. Why wasn't it done in the first instance?

A. We started out in the beginning to make the rule applicable to all territories alike, but there was some opposition to this by other lines because they felt it would result in a very large cost to them in their own territory, particularly Arkansas, and while we did file a definite notice to put in the rule wide-open, to all destinations, after conferences and threshing the matter out, we did withdraw from our definite notice, but we would have no objection to applying it for our account to all destinations.

Mr. Barron: You may inquire.

Mr. Bee: I have a few questions that I would like to ask, and I suppose that I am more or less on the Respondent's side.

[fol. 195] By Mr. Bee:

Q. After the matter was docketed with the Southwestern Bureau to remove the loading charge in Oklahoma, what was the effect of the decision on the Southwestern Bureau?

A. I am not exactly clear as to what you mean.

Q. Was this matter docketed with the Southwestern Freight Bureau?

A. It was.

Q. What was their decision?

A. They disapproved it.

Q. Where did the matter go after that time?

Mr. Barron: Now, Mr. Examiner, I must object to that question, where it went after that, and I don't think that it is of any material interest to the parties here involved; the fact remains that it was docketed and that it was disapproved and the Santa Fe has seen fit to establish the rule and it was suspended, and we are here attempting to justify it.

Mr. Bee: I had this question before another Examiner where Mr. Barron happened to be on the other side of the fence; I object to the very same questions being asked, to such questions in a case involving the rates on sugar, and Mr. Barron insisted on putting in not only the procedure, but an exhibit presented to Commissioner Johnson who was the Commissioner for the railroads, and it was upon that evidence that he tried or attempted to defend the action of the railroads in refusing to put rates in effect into Oklahoma the same as into Texas; it was the identical question that was involved, and over my objection the Examiner in [fol. 196] that case, he overruled us and sustained Mr. Barron and permitted that evidence to go into the record to show that Commissioner Johnson had felt that the rates should not be uniform, and now I want to show in this case that the same procedure was gone through, and that Commissioner Johnson decided that the rates should be uniform. It seems to me that if it was good evidence in one case, that it should be held as good evidence in the other.

Mr. Barron: The facts in the other case are not the same as they are in this case.

Examiner Archer: And this is another proceeding and another Examiner, and I am going to sustain the objection. I do not see that it would interest the Commission as to what the procedure of the carriers has been. As counsel said, we are here to hear the evidence in this particular case. It is very seldom that they do agree.

Mr. Bee: Then I will not be allowed to show the matter went before Commissioner Johnson for the railroads and I will not be permitted to show what Commissioner Johnson's decision was?

Examiner Archer: I think not; I am inclined to sustain the objection.

Mr. Bee: Exception.

By Mr. Bee:

Q. Your line runs through Love County, Oklahoma, the Santa Fe?

[fol. 197] A. That is correct.

Q. You have a compress just south of the Oklahoma border, located at Gainesville on your line, do you not?

A. Yes, sir.

Q. Now, assuming that cotton originated south of Marietta, Oklahoma, a point halfway between Marietta and Gainesville, a gin point, we will say, close to the river, what would be the effect of the owner of that cotton taking the cotton to Marietta, in the one instance, or to the Texas points, in the other instance, in so far as your company applying the charges for loading cotton if the destination was a Texas port?

A. If he trucked his cotton from Love County, Oklahoma into Gainesville, Texas so that is the initial origin so far as the railroad is concerned, we would perform the loading free at Gainesville if it were attended at our depot or cotton platform.

Q. Is there any difference in your rate between Gainesville and Marietta, or do you know?

A. I don't believe there is; I think that they are in the same rate group.

Q. There is a three cent difference in there.

A. I will let the tariff speak for itself because I don't recall.

Q. The shipper then would have at least the advantage of the Santa Fe Railway absorbing the loading charge when [fol. 198] the shipment moved to Gainesville, Texas for initial rail transportation?

A. Yes, sir.

Q. And he would have to pay the loading charge under the present conditions in Oklahoma if he moved the shipment to an Oklahoma origin?

A. Yes, sir, he would either have to pay the loading charge or perform the service himself.

Q. Do you understand that there is a slight premium on what is known as free cotton as against country cotton or are you familiar with that?

A. I am not familiar enough with it to really testify about it; the information I have is more or less second hand.

Q. The rates charged by the carrier for transportation of cotton to the Texas ports build up gradually, do they not, from station to station?

A. Yes, sir, in Texas, it is a mileage scale for distances; within 320 miles of Houston and beyond, they are grouped in mileage blocks which vary as they go out from about 75 to 100 miles up to 150 miles.

Q. They are small groups and constantly increase as they go from the point of 320 miles?

A. That is correct.

Q. A shipper located at an interior point, if the compress point happens to be in a slightly lower rated group, -as the advantage of that lower rate if he transports his cotton to a [fol. 199] lower rated station, does he not?

A. That is correct.

Q. And if the cotton is moved on the truck, as it is necessary as you say at all of your stations to take it to the railroad station, as you have no facilities at gin stands, if they will take it into the compress point there is an additional advantage of 25 cents per bale on account of the loading charge, 5 cents per 100 pounds—no, that is 5 cents per bale.

A. Five cents per bale.

Q. There is an additional advantage to him of five cents a bale for carrying on to the compress point, isn't that correct?

A. Yes, sir.

Q. As against taking it over and putting it on your facility?

A. Yes, sir, that is correct.

Mr. Bee: That is all I have.

Examiner Archer: Any other interests in favor of Respondents that wish to inquire of this witness?

(No response.)

Examiner Archer: Cross examine.

Mr. Mitchell: May I ask the witness a few questions before Mr. Belnap begins?

Mr. Belnap: All right.

Cross-examination.

By Mr. Mitchell:

Q. As I understand, Mr. Jay, the Santa Fe made this change or attempted to make this charge or change in

[fol. 200] Oklahoma largely because of the fact there was this free loading in Texas to certain destinations, isn't that true?

A. That was one factor, and their other one was that we were trying to hold our local cotton for rail movements from our stations where it originated.

Q. Isn't it a fact that you have this free loading in Texas to New Orleans, Lake Charles and the Texas ports?

A. There will be a later witness from one of our Texas offices who handles those matters in Texas and I would prefer that he would answer that question. In other words, I am not as familiar with the practices in Texas as he is.

Q. You don't know what destinations the free loading in Texas applies to, destinations or ports?

A. I think they apply to the ports, but I wouldn't say that definitely.

Q. Just as much to New Orleans as the Texas ports?

A. I think so.

Q. But in publishing this free loading in Oklahoma to meet a situation, you confined it to the Lake Charles and Texas ports, but did not include New Orleans?

A. Yes, sir, but the reason for that is that the Texas Gulf ports and Lake Charles are the ones to which we have Finding 8 in I. C. C. Docket No. 26235.

Q. Now, just one more question, Mr. Jay: Your rate to New Orleans and Lake Charles and the Texas ports from [fol. 201] points throughout Texas are all published in the same tariff, are they not?

A. The rates from Texas?

Q. From Texas to all the Gulf ports, including New Orleans and the Texas ports and Lake Charles.

Mr. Veale: I will testify to this Texas situation and if you will hold your questions up until I get on that, boys, I will give you the answers.

Mr. Mitchell: He did mention this situation.

Examiner Archer: If he doesn't know, he may say so, and let's go along.

(No response.)

Examiner Archer: Any further questions?

Mr. Mitchell: That is all.

By Mr. Belnap:

Q. The item with which we are dealing is found both in the Southwestern Lines 237 Series, and in the rate tariff, which is the 208 series, is it not?

A. Yes, sir.

Q. Why do you have it in both tariffs?

A. In the transit tariff, we provide inbound transit rates to the compress or warehousing stations, and in order that the application is clear in connection with the inbound rates, we publish the rule in the transit tariff. There is a rule in the tariff, the rate tariff, which says that shippers must load cotton and that is in the carload rate tariff, so, in order to make the privilege available in connection with [fol. 202] the through rates, we publish it in the rate tariff also.

Q. Your proposal is to provide the free loading even as to a shipment which is tendered to you as a carload?

A. Yes, sir, if it is tendered to us on our depot or cotton platform.

Q. Is the carload subject to any of the various minimum weights carried in the tariff?

A. Yes, sir, that is correct.

Q. You mentioned that in your transit, that is 237-E, you provide this proposed item for application in connection with the inbound rates from gin points to compress points?

A. That is correct.

Q. Generally speaking, those are token rates, are they not,—that is, that you will probably give a shipper back all that he has paid in or substantially all that he has paid in under a later transit settlement and those token rates to the compress points, they apply regardless of the ultimate destination that the cotton may be shipped to from the compress points?

A. No, there is an application as to the destination territory provided in Southwestern Lines Tariff 237 Series, but, generally, it is fairly wide in its application; in other words, it does apply to Texas ports and to any interstate destination, we might say, east of the Rocky Mountains or Canada.

Q. That is to say, in this transit tariff, there is this scale of "floating in" rates or a schedule of floating in [fol. 203] rates which will apply from Oklahoma gin points to the compresses in Oklahoma on your line,—the cotton

will pay that floating in rate at the time of the initial movement by rail, regardless of whether it ultimately goes to the Texas ports or to Louisiana, or to domestic mills in the Southeast?

A. That is correct.

Q. That is correct, isn't it?

A. Yes, sir.

Q. But your proposal as to cotton which is moved inbound on that character of rates is to make the charge which is to be borne by the traffic different depending upon the final destination in so far as that charge is affected by the cost of loading?

A. Will you read that question?

Examiner Archer: Read the question, Mr. Reporter.

(Question read.)

By Mr. Belnap:

Q. In other words, for the line service, you might say, you will treat every bale of cotton alike regardless of whether it is going to Houston or to some domestic mill in the southeast, so far as the line service is concerned, moving from the gin points inbound to the compress, but you do propose to make a difference in so far as this matter of loading charge is concerned?

A. That is correct.

Q. Do you have the same interest in getting the cotton [fol. 204] onto the rails at the gin points so it may move by rail to the compress when the cotton ultimately goes to the southeast as when it goes to the Texas ports?

A. Yes, sir, and even more so at the present time when the movement has slackened up to the Gulf ports and increased to the southeast.

Q. And from the standpoint that you have just mentioned, is there any possible justification in what is apparently a discriminatory proposal?

Mr. Barron: Don't answer that as to its being a discriminatory proposal; we have stated that we would be willing to put it into the southeast.

Mr. Belnap: I understand, but I am asking about it from the standpoint, as to the situation of the cotton mov-

ing into the southeast, is it not exactly the same as cotton moving to the Texas ports?

The Witness: No, not exactly.

By Mr. Belnap:

Q: The trucking?

A. The trucking is the same.

Q. Well, that is what we are talking about, the trucking from the gin points into the compress points.

A. That is right.

Q. But you say as far as the Texas ports, there is some possibility of this truck movement all the way through to the Texas ports and there is not a possibility of it going [fol. 205] that way to the domestic mills in the southeast?

A. Yes.

Q. That is the only difference?

A. Do you mean the only difference which justified us in not putting in the free loading to the southeast?

Q. Yes.

A. In so far as the justification of it is concerned, there is another justification for not doing it,—that is the rates to the southeast are already lower, relatively, than they are to the ports.

Q. You are going to work out your line haul rates by what you do or don't charge for the accessorial services, is that the basis for your proposal?

A. No, you didn't ask me that.

Q. When you made the reduction about which you spoke, this recent reduction—what date did you make those in the line haul rates?

A. (No response.)

Q. It was some time in June, 1940, was it not?

A. June 20, 1940, I believe.

Q. Yes. And so far as Oklahoma is concerned to Texas ports, to you know how much the reduction amounted to?

A. That varied; the reductions were greater for the longest distances, greater for the longer distances than they were for the shorter distances, that is in so far as [fol. 206] Oklahoma is concerned.

Q. I am talking about Oklahoma.

A. That is right.

Q. And that goes up to as high as 13 cents?

A. Yes, sir.

Q. And whatever reductions the lines made to the Texas ports, you made the same reduction, did you not, in the rates to the Carolinas?

A. No, we took a territory which was representative and also an important part of the southwest for movement to the southeast and determined the reduction there and used that as a yardstick to the Carolinas. From other points in the southwest, it wasn't the same figure of reduction.

Q. You devoted considerable of your testimony to describing the any quantity scheme of rates and how cotton moves under that basis of rates. How does that apply to this case? I didn't get the connection, what it was given for.

A. The purpose of giving that history is to show that cotton is essentially a less than carload or any quantity commodity and that we have preserved that character even in our Carolina rates by permitting less than carload shipments to be concentrated into carloads, by permitting less than carload shipments to be pooled even though they were billed on several bills of lading, to be pooled in one car and could receive the benefit of the carload rates or they can be [fol. 207] billed for an intermediate stop to be consolidated at a compress point to obtain the benefit of a carload rate.

Q. Do you have any figures at all on the numbers of bales trucked from gin points in Oklahoma to interstate destinations?

A. No, I was unable to get any accurate information as to the destination of cotton trucked from gin points.

Q. Do you have any information as to some of the destinations as to which it was trucked from the compress points?

A. Yes, sir.

Q. And do you have it by number of bales for destinations?

A. No, it wasn't prepared in that manner at all. I merely did this: We made inquiry of our shippers and of the compresses as to the destinations to which the cotton was generally being trucked, and we had that information verified in a periodical way by our auditing office representative who checked the compress records for policing transit.

Q. Were you informed that some of the cotton trucked from compresses was trucked from Oklahoma to the Texas ports?

A. Yes, sir.

Q. How much of it?

A. The bulk of the movement is either to Texas ports or to Texas mill points, and the movement is greater to the ports than to the mill points.

Q. And this past season that movement, up to some date in June, amounted to 6,691 bales, at the date that you cut off?

[fol. 208] A. Yes, sir, that is correct.

Q. Now, would your proposal affect in the slightest the charges that would be paid upon that same cotton if it had moved by rail instead of by truck?

A. Yes, it would.

Q. How?

A. (No response.)

Q. That is the cotton that is trucked out of the compresses?

A. That is a difficult question to answer because we are unable to obtain the rates being charged by trucks; they are private trucks; some of them even buy the cotton at origin and sell it at destination.

Q. I am inquiring if that same cotton had moved by rail, contrasting the present tariff with what you propose to put in the tariff, will there be any change in the rail freight rates to be paid?

A. There would be no change in the rail freight rates but there would be a change in the total charge amounting to five and a half cents a bale.

Mr. Barron: Represented by the loading charge?

The Witness: Yes, sir, represented by the loading charge.

By Mr. Belnap:

Q. Assuming that you load it and assuming this 6691 bales moved into the compress by rail—you have to put two if's in there, do you not?

A. Yes, sir, that is right, and further, that it would be [fol. 209] treated tendered on our depot or cotton platform.

Q. Do you have a local disposition rule in Oklahoma?

A. Yes, sir, we do.

Q. If cotton moves out of a compress point by truck, does that have any effect—and it moved in by rail,—does that local disposition rule affect the charges which you collect from the shipper?

A. No, it does not now; it did at one time.

Q. If that 6691 bales had moved in by rail, would you expect that cotton, or bales representative of that cotton by process of substitution, to move out by truck, or would you not expect it to move out by rail in order that a consolidation or concentration claim could be filed, and the shipper recoup his inbound charges?

A. We would have a very good reason for expecting it to go out by rail.

Q. If it moved in by rail?

A. There would be value to the shipper of the inbound charges already paid as represented by the freight bill and we have found that, in the past two or three years at least, that the trucking out from a compress of cotton that moved in by rail has fallen off considerably.

Q. It practically amounts to nothing?

A. Yes.

Q. And anything that is trucked out is ordinarily cotton [fol. 210] that was trucked in, is that correct?

A. That is right.

Q. So, if this particular 6,691 bales which did move out by truck had moved out by rail instead, it would have possibly come to you as free cotton at the compress point?

A. That is correct.

Q. So that particular cotton would have never been loaded by you at some gin origin?

A. It would have come to us at the compress point as free cotton, but there is a large share of that cotton which originates at a local gin point served by the Santa Fe and we should have received it at a station instead of at the compress.

Q. That is a problem though of getting it into the compress?

A. That is part of our problem of truck vs. rail.

Q. I understand that; you want to take the loading charge off to move by rail into the compress rather than by truck, and that applies as much on cotton going to the Carolinas as on cotton going to the Texas ports?

A. But now we are dealing with cotton truck out of the compress, which cotton represents already a part of our loss from our local gin points. You can't divorce them.

Q. All right.

A. For the information of the record—no discussion has been made heretofore about the substitution rule, but for

the information of the record, there is a rule provided in [fol. 211] our transit tariff which permits the substitution of one bale for another to facilitate the gathering together of carloads of the desired grade or staple of cotton to be shipped to a customer at one destination.

Mr. Barron: Any further questions?

Mr. Belnap: Yes, I just have one more question.

By Mr. Belnap:

Q. Do you have throughout all Oklahoma, in its entirety, the same rules, regulations and practices in connection with the handling of cotton as you have on cotton, rules, regulations and practices?

A. They are the same, in general principle; there are some differences because of individual situations being different.

Mr. Belnap: That's all I have.

By Mr. Baumann:

Q. What is the amount of the present loading charges in Oklahoma?

A. In Oklahoma?

Q. Yes.

A. Five and a half cents for a square bale and two and three quarters cents for a round bale.

Q. What is the weight of a square bale?

A. The average weight in Oklahoma was 535 pounds at the last time that we obtained an average for the purpose of publishing one in our tariff.

Q. That is sufficient. And a round bale,—what is the weight or average or approximate weight, to the best of [fol. 212] your knowledge? And it is about half of what the square bale is, isn't it?

A. It's approximately one half, I think.

Q. Approximately one half. Of this cotton that you have handled in Oklahoma, on how much did you collect a loading charge? What I mean by that is that you gave certain figures of how much cotton you handled in Oklahoma. Now, how many bales did the shipper request the carriers to load the cotton for him?

A. We didn't compile that figure for that because if we did that, it would have been necessary to run through all

our inbound billing, but we did get an estimate from our operating department and they told us that it was at least less than 15 per cent of the cotton tendered to us that they asked us to perform the loading.

Q. In other words, the 85 per cent of the cotton was loaded by the shipper himself on your own facility?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. How do you accomplish this loading of cotton?

A. We accomplish the loading through our local station forces or in the case of non-agency stations, by our section crew or, instances where it is necessary to hire additional help over and above our regular help, we hire them and pay for it as extra labor.

[fol. 213] Q. How much does it cost you to load this cotton? How much does it cost the railroad itself to load this cotton?

A. Under our present rule in Oklahoma?

Q. Yes, under the present rule, when you do the work, when the railroad does the work?

A. I recall—

Q. Where you hire the labor, how much per hour do you pay them?

A. It costs from two to three cents, about three cents a bale for the first tier in a car, and from five to seven cents a bale for the top tier in the car.

Q. The top and the bottom tiers are about the same number of bales, and a good average cost would be about five and a half cents a bale, wouldn't it?

A. Less than that.

Q. Well, approximately like that?

A. It would be a fraction less than four cents a bale on an average.

Q. That, of course, is your direct out of pocket expense to the railroads?

A. Under the present conditions, we have had very little extra labor cost.

Q. Your station forces are paid on a certain basis per hour,—possibly on a higher basis than what you hire outside labor for, is it not?

A. If they work overtime; yes.

[fol. 214] Q. How much do your section men get per hour?

A. I wouldn't know that.

Examiner Archer: Would you have to pay them any more or different wages by reason of the fact that they are loading the cotton?

The Witness: I don't know just what the amount of it is; our operating department told us the extra labor cost over and above our extra force and regular force was very slight under present conditions.

By Mr. Baumann:

Q. But whatever it is, it is an out of pocket cost to the railroad in loading this cotton?

A. Yes, sir, it is an out of pocket cost.

Examiner Archer: When your regular employees are loading cotton during their regular hours, do you pay them any more than their regular wages just because they are loading cotton? You pay them so much a month, I suppose, or pay them by the week?

The Witness: The station forces are usually paid by the month; the section crew is paid by the day.

Examiner Archer: If they are working during their regular hours and working in loading the cotton, it comes within the scope of their monthly or daily wages, is that correct?

The Witness: That is right.

Mr. Barron: There is no additional cost if they are tamping ties or loading cotton, if it is within their regular hours [fol. 215] of employment?

The Witness: That is correct.

By Mr. Baumann:

Q. But there is a cost to the railroads on this type of work, because they are not doing anything else while they are doing this work of loading the cotton?

A. There is a cost, but it is hard to segregate.

Q. You stated that 22.1 per cent of the cotton handled in Oklahoma was handled by your line. Can you tell me what percentage of the gin or compress points you serve as relates to the other carriers,—for a relative study?

A. I would be glad to compile that—

Q. Do you know now?

A. I would have to add them up; I have them by counties, but I would have to add them up.

Mr. Barron: Will you have that information available during the day?

The Witness: Yes, sir, I will have that available during the day.

By Mr. Baumann:

Q. Would you say that your operations are more extensive than any other carrier in Oklahoma, or equivalent to any other carrier, by comparison?

A. Not throughout the cotton territory in the entire state, but through the counties that we serve, on the average, we have more gins and a greater mileage in the county than the other carriers. That is not true of every county.

[fol. 216] Q. But your line does not serve any particular gin or compress, as I understood it, directly by rail?

A. That is right; they may be a half a block away or eight blocks from our depot.

Q. Do you know if it is a fact that the Government loan cotton is trucks because the Government will not accept a freight bill,—do you know that as a fact?

A. No, sir, I don't know that as a fact. I doubt that it is a fact because there is so much of our rail cotton that is on Government loan that has a freight bill behind it.

Q. Is that on the reconcentrated cotton?

A. No, sir, that is on first concentration cotton.

Mr. Lallinger: Actual gin point cotton?

The Witness: Yes, actual gin point cotton.

Mr. Lallinger: To the first compress movement?

The Witness: Yes.

Mr. Lallinger: You handle a lot of Government loan cotton?

The Witness: It is not Government loan cotton when it is moved in.

Mr. Lallinger: But the man knows at the time it is moving that it will go on a Government loan?

The Witness: Yes, sir, that is right.

Mr. Lallinger: It is Government loan cotton then, and will go into a loan?

Mr. Baumann: That is all.

[fol. 217] Redirect examination.

By Mr. Barron:

Q. Did you answer that there weren't any gins or compresses in Oklahoma directly on the rails of the Santa Fe?

Mr. Baumann: I meant served by the rails if I said directly.

The Witness: I will have to correct that; we have no gins in Oklahoma whose cotton platform is served by rail; but we do have compresses.

Mr. Baumann: That is all right; in those instances, in all of your cases, it is necessary for a shipper to haul it to your platform?

The Witness: Yes, sir.

Mr. Baumann: And in spite of that, you find only approximately 15 per cent of them ask you to load it?

The Witness: That is right; they didn't want to pay the penalty.

Mr. Baumann: Is there another witness that will speak about Texas?

The Witness: Yes, sir.

Mr. Barron: Yes, sir.

Mr. Bennett: I would like to enter my appearance at this time; Alonzo Bennett, 81 Monroe Avenue, Memphis, Tennessee, appearing for Mississippi Valley Interior Compress & Cotton Warehouse Association and Federal Compress & Warehouse Company, Memphis, Tennessee; and C. M. Spence, an attorney, whose address is 1705 Olive Street, St. Louis, also representing the same concerns; Mr. Spence is [fol. 218] not present.

Examiner Archer: What is your position in this proceeding?

Mr. Bennett: Our position is that the suspended tariffs are discriminatory on cotton moving east toward Little Rock and Memphis, and we will ask that the carriers remove that discrimination.

Examiner Archer: You are a Protestant then?

Mr. Bennett: I guess you would call it a Protestant. In other words, we will protect our interests as they may appear.

Re-cross examination.

By Mr. Thornton:

Q. Now, referring to your Exhibit No. 1, Note 1 at the bottom of the page, is that information taken from the actual records or is that an assumption of yours that cotton may be transited on through Southern Freight Association Territory,—your Exhibit 1?

A. We included in our figures here on Exhibit 1 to SFA Territory cotton moved by rail from our origins to Little Rock or Memphis. The reason is because there is very little or no local consumption at those points, and such shipments are billed under inbound transit rates for the purpose of reshipping and our line has no routes through Memphis to Official Territory, so that must be shipped to SFA Territory.

Q. But based on that statement and the assumption it was transited on to SFA Territory and was not based upon the check of the actual billing beyond these transit points as [fol. 219] reported back to your railroad?

A. Yes, we merely classify that movement as in the same general direction.

Q. You referred to the movement from Chickasha as a compress point by truck to Texas ports or some other destination. You did not distinguish that movement by truck as from the compress facility as distinguished from a cotton yard or some other facility aside from the compress facility. Now, was all that cotton trucked from the compress facility?

A. Yes, sir, and our information was obtained from the compress records.

Q. No flat cotton was moved from the cotton yard or compress points by truck?

A. We have no information about that.

Q. So far as you know, this was all compressed cotton?

A. It could have been compressed or it might have been stored in the compress warehouse and trucked out as flat cotton?

Examiner Archer: Is that all, Mr. Thornton?

Mr. Thornton: Yes.

Examiner Archer: Any other cross examination?

Mr. Bennett: I have just a few questions.

By Mr. Bennett:

Q. Mr. Jay, I am sorry that I was late in arriving at the hearing this morning, and you may have already answered this question, I don't know, because I have just gotten here. But, do you intend to remove the charge on cotton that [fol. 220] moves through Memphis?

A. I made the statement that we would have no objection to performing free loading at our Oklahoma stations on

traffic to all destinations, but I explained further that after starting out to do that, we withdrew from our purpose of establishing the free loading on traffic to the southeast because it would involve some of the other lines who have very strongly represented to us that it would result in a big cost to them.

Q. If the Commission should approve the suspended tariffs, would it be your intention to remove the discrimination on cotton that moves through Memphis?

Mr. Barron: Don't answer that question, because if you do, Mr. Witness, you will admit that there is a discrimination.

Examiner Archer: Make it a difference rather than a discrimination.

By Mr. Bennett:

Q. If the Commission approves the suspended tariffs, is it the position of the Santa Fe and the other lines involved that they will remove the charge on cotton that moves through Little Rock and Memphis for concentration and for shipments subsequently as to where the rates apply?

Mr. Barron: Mr. Jay can only answer for the Santa Fe Lines.

Mr. Bennett: You see I got here late.

By Mr. Bennett:

Q. If the Commission approves the suspended tariff—that is your suspended tariff, will it be the Santa Fe's intention to remove the charge on cotton that is concentrated [fol. 221] at Little Rock and Memphis or any other point in the Mississippi Valley territory and subsequently reshipped to points where through rates apply through such transit points?

Mr. Bee: I object to that; this is a proceeding to determine whether it is reasonable and lawful to remove these charges to the Texas ports and Lake Charles and I never heard of the Commission saying a reasonable and lawful procedure can't be engaged in by a carrier because it might be discriminatory somewhere else. That is a case to stand on its own bottom if they want to bring it, but I object to what happens to the Tennessee points, to those points which

he has named, which are not involved in this matter whatsoever.

Examiner Archer: I am inclined to agree with Mr. Bee, but I will permit the witness to answer if he would be willing to do it.

Mr. Barron: He stated that he would.

Mr. Bee: He stated that he would.

Mr. Bennett: I didn't hear it.

Mr. Barron: It is in the record, and it is unfortunate that we must go over what has already gone into the record here today.

Examiner Archer: He has stated it heretofore, but you may answer it.

The Witness: I have already stated that we would have no objection to performing free loading of traffic to all des-[fol. 222] tinations. But, as I understand your question, Mr. Bennett, you want to know if it is our intention to proceed to do it.

By Mr. Bennett:

Q. My question is this: That if the Commission approves the suspended tariffs, will you remove the charge on cotton that is concentrated at Little Rock and Memphis and other points in that section that is reshipped to points where the through rates apply?

Mr. Bee: I object to that question as not being germane to the issues here involved.

Examiner Archer: I will permit him to answer it; he can say yes or no, and we will stop right there.

Mr. Barron: I want to call attention to the fact that the witness is not appearing for a line that serves Little Rock or Memphis.

Examiner Archer: He can say what the Santa Fe would be willing to do or whether the Santa Fe would be willing to participate in such an arrangement.

Mr. Bennett: Now, here is Exhibit—

Examiner Archer: Let him answer it.

The Witness: I will answer it for you: We have no program to do that right now, but, obviously, for the portion of the traffic that is now moving to the southeast, which we would like to control by having freight bills from our local points into the compress points, rather than having it trucked, we may find it necessary to reopen the question

[fol. 223] with the Southwestern lines of performing free loading to the southeast, but I can't say that we would put it in because we don't serve the river gateways and some of the other lines may refuse to participate with us in rates or routes in connection with which free loading is performed.

By Mr. Bennett:

Q. In other words, your answer is that you don't know?

A. I just don't know.

Q. Did you give any figures on the number of bales trucked from off your road, from Oklahoma to the Texas ports?

A. I gave some trucking figures from four compress points in Oklahoma for the season 1939-40, 22,163 bales.

Mr. Bee: That was not to the Texas ports; that was merely from the compresses. You didn't have the destination.

The Witness: I am going to explain that to him.

Mr. Barron: Isn't it all explained in the record? Isn't it very unfortunate that we have to go over it again just because Mr. Bennett wasn't here?

Examiner Archer: I don't think he gave any destinations on the trucking; he gave it, but he didn't state the destinations as I recall it.

The Witness: Yes, sir, I stated this was the trucking from the compresses where we could get the information and that from the information that we were able to get we state that the majority of it was to Texas ports and Texas mills.

[fol. 224] By Mr. Bennett:

Q. How many bales in the 1940-41 season?

A. 6,691.

Q. To what do you attribute that difference?

A. The trend of the movement during the past season has been to the mills in Southern Territory and the port movement has dropped off considerably both by rail and by truck.

Q. There is hardly any export movement at the present time?

A. That is right.

Mr. Bennett: That is all.

Examiner Archer: Are there any further questions to be put to this witness?

(No response.)

Examiner Archer: Is there any redirect examination?

Mr. Barron: No redirect, Mr. Examiner.

Examiner Archer: You are excused.

(Witness excused.)

Examiner Archer: Call your next witness.

Mr. Barron: I will call Mr. Veale.

W. L. VEALE WAS SWORN and testified as follows:

Direct examination.

By Mr. Barron:

Q. Please state your name, address, occupation, and briefly your experience.

A. My name is W. L. Veale; I am employed by The Panhandle & Santa Fe Railway Company in Amarillo, Texas [fol. 225] as chief tariff clerk; I have been in railroad service for 24 years, all of which has been spent in Texas, and since July 1, 1926 I have been in the tariff departments of the Panhandle & Santa Fe Railway Company.

Q. Mr. Veale, will your testimony be directed solely to I & S Docket No. 4981?

A. Yes, sir, that is correct.

Q. Have you prepared or had prepared under your direction and supervision some exhibits which you wish to introduce in connection with your testimony in this proceeding?

A. Yes, sir.

Q. Are such exhibits true and correct to the best of your knowledge and belief?

A. Yes, sir.

Q. Will you please proceed with your testimony, beginning with your Exhibit No. 2?

A. I would like to explain in connection with our exhibits that in our haste to catch our train to come down here, that we left one of our exhibits at home, and it is one which deals with the movement of cotton during a representative period from Texas origins to the port of Houston, Texas and it was prepared by the Houston Port & Traffic Association. I can mail copies of that exhibit to the parties of record and to the Commission, but I would like to refer to it.

Examiner Archer: Is there any objection to receiving that [fol. 226] exhibit after the hearing?

(No response.)

Examiner Archer: Are you going to explain exactly what it shows?

The Witness: I am going to give the approximate total number of bales trucked to Houston as represented by this report, from the state of Texas and from Oklahoma, just in round figures; and most of those here, at least some of those who are here have seen that report because it has been used in another hearing in the matter of reducing freight rates in Texas.

Examiner Archer: The exhibit may be submitted within ten days from the close of the hearing.

(Exhibit referred to above to be submitted by Witness Veale within ten days.)

By Mr. Barron:

Q. Will you please proceed, Mr. Veale?

A. While the question of loading cotton at origin points in Texas is not on trial here, my testimony will, in the main, be devoted to the Texas situation.

My appearance here with testimony and facts concerning the loading of cotton in Texas is based upon the desire to place in the possession of those concerned in these proceedings factual information which should be helpful in arriving at a decision in the instant proceedings.

We believe that the experiences of Texas lines under a [fol. 227] free-loading rule are of greater value than statements which may be made here and which have only a theoretical basis.

The Santa Fe System Lines have a decided interest in the transportation of cotton, serving as they do, a wide area of heavy production. The Panhandle and Santa Fe Railway Company particularly has a definite interest in rates and practices which concern the transportation of cotton. That those interests may be fully realized, I introduce my Exhibit No. 2, which is a statement showing number of bales of cotton ginned in various areas and in the periods denoted of the exhibits that is for the crop years of 1931 through 1940.

(Exhibit No. 2, Witness Veale, marked for identification.)

The Witness: I would like to call attention to this fact, that on a ten year average, running back to the year 1931, there was produced in the counties which The Panhandle & Santa Fe Railway operates in Texas an average of 20,000 bales more than was produced as an average figure for the same ten years in the entire state of Oklahoma. From this exhibit it will be noted that the production in the counties in Texas served by The Panhandle & Santa Fe Railway is substantial and compares very favorably with the entire production of either of the states of Arkansas or of Oklahoma.

For ten or more years carriers have been greatly concerned about the transportation of cotton by truck. Their problem has been especially difficult because the bulk of [fol. 328] cotton moved by truck is handled by unregulated vehicles.

By various subterfuges, truck operators have escaped all laws designed to regulate motor carriers, except the Texas 7,000 pound load limit law which has now been repealed in favor of a higher limit. Under the new law, it is possible for a motor carrier to transport in excess of 20,000 pounds of cotton.

Lacking any legal recourse, the Texas carriers have had no recourse to prevent the loss of their cotton traffic other than the liberalization of their rules, reductions in their rates and the removal of such accessorial charges as tended to make rail transportation less attractive and motor transportation more attractive. That is the only recourse they now have.

As evidence of the seriousness of this loss of cotton traffic to railroads, I would like to now discuss my exhibit which will be submitted after the hearing, being the one that inadvertently I failed to bring along. This is a statement of cotton received by truck at the Port of Houston, Texas, for the period August 1, 1939, to February 1, 1940, and was prepared by the Houston Port and Traffic Bureau. This exhibit discloses that out of in excess of 500,000 bales of cotton moving from Texas origins or Texas origin points by truck, that the bulk of it originated in the territory within 250 to 300 miles of Houston, but it also discloses that considerable cotton was hauled by truck for longer hauls in Texas, [fol. 229] as, for example, the concentration point of Lub-

bock, Texas, which is in excess of 500 miles from the port of Houston. That exhibit is gotten up by counties, and shows the movement by counties and there was in excess of 30,000 bales of cotton handled from Lubbock County for that long distance. The exhibit also shows the movement from Oklahoma to the port of Houston and shows between 18 and 19 thousand bales of cotton was trucked to Houston during that period which I mentioned here.

In addition to the movement of cotton by truck to Gulf ports, there was an enormous amount of cotton trucked into concentration points. There still is a considerable amount of cotton so moved. In its petition for suspension of the "free-loading" rule in Texas, the Southwest Compress and Warehouse Association said:

"Since the original publication of carload rates from Texas origins to Gulf ports 32.6% to 44.6% of the total annual receipts of interior transit stations in Texas have been received at such stations by motor trucks or other non-rail means."

Mr. Belnap: I object to that, Mr. Examiner; if he is going to read from what somebody else said, that is purely hearsay.

Mr. Barron: This is taken from your protest.

Mr. Belnap: From whose protest?

Mr. Barron: From the protest of the Southwest Compress and Warehouse Association.

[fol. 230] Mr. Belnap: Not a party to this Association.

The Witness: This was a statement made by the Protestants in a like proceeding in Texas in the case of the Texas rule, they asked the Commission to suspend this identical rule in Texas and the purpose of this recitation here is to show the Commission in this case that there is a heavy movement of cotton by truck to concentration points and it is admitted by the only party that can tell you that.

Mr. Belnap: No party here.

Examiner Archer: I think that it is doubtful testimony.

Mr. Barron: The only purpose is to indicate that we had an identical situation over in Texas as we now have in Oklahoma, and it is merely to point out the factual situation that was confronting the carriers. Am I correct, Mr. Veal?

The Witness: Yes, sir.

Mr. Belnap: Oh, I object to it as hearsay.

The Witness: And I will state this too: That the time we were considering and did take off the charge for loading cotton in Texas, from 32.6 to 44.6 per cent of the total annual receipts at interior concentration points moved into those points by truck. And that information can be verified from the compress companies' records in the state of Texas if somebody can get in to see them.

In their reply to the suspension request in Texas, the Texas carriers told the Commission that the cotton was [fol. 231] actually trucked from the limits of rail stations to compress points to escape the payment of the loading charges or to avoid the necessity of performing the loading service on the cotton themselves.

Texas carriers were greatly concerned over this particular type of movement, since it distorted the normal transportation of cotton by taking cotton away from one line and making it available to another line. In 208 ICC at 695, the Commission said:

"* * * most of the railroads concerned are apprehensive and apparently with good reason that once the cotton is on a truck it may be carried by the truck all the way to a port or at least to a railroad junction point from which it could move out over a railroad other than the one along whose line it originated, thus depriving the latter of any haul thereon."

That the imposition of a loading charge was responsible for a great deal of this trucking to transit and junction points, the carriers were certain.

In this carload case, the Commission again said that approximately one third of the cotton which is compressed in the interior was not gathered into the compress point by rail, but by other means of transportation.

Not approximately one-third but a greater amount was being gathered into compress points by facilities other than [fol. 232] rail. In its petition for suspension, the Southwest Compress and Warehouse Association admitted and stated that 43.9% of the cotton receipts of cotton at interior Texas compresses and warehouses during the 1938-1939 season was received by truck. I don't know whether it is proper to tell you that is what they said or not, but those are the only people who can give you that information.

Examiner Archer: You should have had them here.

The Witness: After mature consideration of the quantity of cotton being handled by truck and the character of the truck movements, the Texas lines concluded that the requirements that a shipper load his own cotton, or that in lieu thereof he pay a charge for the loading service performed by the carrier was detrimental to their interests, and was responsible for a part of the truck movement. They therefore concluded to cancel the provision and in lieu thereof provide for the loading of cotton by carriers without charge. Accordingly, proposals were issued and placed upon the public docket bulletin.

Our records do not show any shipper opposition.

The Southwest Compress and Warehouse Association, which is not a shipper in the true sense of the word, protested the proposed rule and later requested its suspension. Cotton firms and cotton shippers were, to the contrary, very much in favor of the proposed rule in Texas, terming [fol. 233] the loading provisions and the loading charge a nuisance.

The Texas rule was published in Item 40-A, Supplement No. 4, to Texas Lines' Tariff No. 71-E, ICC No. 480, scheduled to become effective October 15, 1939.

The Interstate Commerce Commission denied the suspension request of the Southwest Compress and Warehouse Association, based upon the showing made by Texas carriers in their reply through their agent, Ira D. Dodge. Effective August 28, 1939, the Railroad Commission of Texas authorized for intrastate traffic the same rule as published for interstate application.

Since the free loading rule was adopted by the Texas carriers, the Panhandle & Santa Fe Railway has experienced a heavier per car loading of cotton moved from country origins to transit stations.

(Exhibit No. 3, witness Veale, marked for identification.)

The Witness: I now submit a one page statement which has been marked for identification as my Exhibit No. 3, which shows the number of cars and bales of cotton handled into concentration and consolidation points by The Panhandle & Santa Fe Railway during comparable periods before and after the provision for loading by carrier without charge became effective. My Exhibit No. 3, which I have just described, will show that there has been an increase of

4.7 bales per car in the period September 1, 1939 to January 31, 1940, inclusive, over the corresponding period in 1938-1939.

[fol. 234] This increase occurred notwithstanding that the rule did not take effect until October 15, 1939. While complete particulars are not yet available, preliminary advices from our station forces indicate that the average loading per car inbound to transit points during the current season will be in excess of 30 bales per car. We close our reports as of July 31 and for that reason we aren't able to give any specific figures for this year.

Heavier loading is to be expected because when the carrier loads the cotton it will do everything possible to conserve equipment. This can be accomplished by double decking cotton—a feat which it was almost impossible to persuade cotton shippers to do when they were doing their own loading.

Referring again to my Exhibit No. 3,—if the 183,627 bales handled in the latter period has been moved at an average of 24.7 bales per car, which was the previous season's average, 7,434 cars would have been required—or an increase of 1,189 cars over the number actually used. Naturally, such an increase would have meant increased expense, such as car depreciation, track maintenance, additional switching, etc.

There has been much conjecture as to the cost of loading cotton when performed by the carrier. In the discussion of this subject by carriers, many of them have relied upon a figure of five and a half cents per bale as being the cost with which they would be faced if they were to perform the [fol. 235] loading. Five and one half cents per bale was the charge assessed against shippers, but it does not follow that this figure will be the cost of loading.

(Exhibit No. 4, witness Veale, marked for identification.)

The Witness: My Exhibit No. 4, consisting of one sheet, and which I now desire to introduce, is a statement showing the number of bales of cotton loaded by the Gulf, Colorado and Santa Fe Railway and The Panhandle & Santa Fe Railway in Texas during the period August 1, 1940 to June 30, 1941, inclusive, and cost of performing the loading service. As the heading indicates, it discloses the cost of loading cotton upon the Santa Fe System Lines in Texas during the

current season, beginning with August 1, 1940 and ending with June 30, 1941.

I will ask you to make some corrections in this exhibit,—that is, correct the figures for the G. C. & S. F. as to the number of bales loaded, the total cost and the average per bale cost of loading; at the time that we prepared this exhibit we didn't have the complete figures for the G. C. & S. F., lacking the Gulf Division, but to give you the figures of all cotton loaded in Texas by the Santa Fe, and if you will correct the exhibit under the column entitled "Number of Bales Loaded" opposite "G. C. & S. F." substitute the figure of 131,202 instead of 98,447. And under the column headed "Total Cost of Loading" the cost is now \$4,341.66 instead [fol. 235a] of \$2,981.45 as it appears on the exhibit as mimeographed. In other words, the number of bales loaded by the Gulf, Colorado and Santa Fe Railroad should read 131,202; the cost should read \$4,331.66, and the average for that railroad should read 3.31 instead of 2.94.

Now, your totals on that exhibit will be changed, and the total under the column headed "Number of Bales Loaded" will be 281,795; the total cost will now be \$9,757.29; and the average cost will be 3.46 cents per bale instead of the figure 3.34 now shown, before this correction.

This exhibit can now be corrected by eliminating the reference mark No. 1 and also the explanatory note on the exhibit under reference mark No. 1.

This exhibit is self-explanatory and shows the average cost to have been, as now corrected, 3.46 cents per bale. It will be noted there is a difference in the cost as between cotton loaded on the Gulf, Colorado & Santa Fe and cotton loaded on the Panhandle & Santa Fe. This difference is explained by the fact that in the Gulf, Colorado & Santa Fe Territory it is possible to secure labor cheaper than in The Panhandle & Santa Fe Railway territory.

My Exhibit No. 4, which we have just been discussing, shows that The Panhandle & Santa Fe Railway loaded 150,593 bales of cotton. The total movement originated by the Panhandle & Santa Fe Railway during the period August 1, 1940 to June 30, 1941, was 346,338 bales and, therefore, the [fol. 236] Panhandle & Santa Fe Railway was required to load only 43.48% of the cotton originated by it. That cotton not loaded by the Panhandle & Santa Fe Railway was cotton which originated as direct shipments to Official or territories other than Gulf ports and cotton which, because of

the nearness of the transit point, was transported by truck direct to the transit station. Within certain distance limits, there will always be a movement of the latter character.

While, as previously stated, the Texas rule is not on trial here, I desire to introduce some movement figures from Texas which will bear upon the Section 3 discrimination claimed if the Oklahoma rule is made effective.

(Exhibit No. 5, witness Veale, marked for identification.)

The Witness: I submit as my Exhibit No. 5 a one page statement entitled "Comparative Statement for Periods shown Disclosing Trend of Movement of Cotton Originating in Texas on The Panhandle & Santa Fe Railway", which shows the movement of cotton from origins in Texas on the Panhandle & Santa Fe Railway for the period shown. This exhibit shows a substantial decline in the movement of cotton to Houston or to Texas Gulf ports and a substantial increase in the movement of cotton to Southern and Official Territories.

Despite the higher rates in effect from Western Texas than in effect to the Gulf ports, cotton shippers are able [fol 237] to dispose of their cotton in domestic mill areas and this exhibit supports the belief that cotton may freely move from Texas origins to all destinations under the present rates and regulations.

In 208 I. C. C. 695, the Commission prescribed a relation in the rates to Gulf ports from Southwestern origins. The rates from two Texas points substantially the same distance from any Gulf port, Lake Charles, Louisiana, and west, must be the same. This is likewise true of any two origins in Oklahoma or any two origins, one of which is in Oklahoma and the other in Texas. A relationship was also prescribed so that the rate from one origin in Texas to two or more Gulf ports, Lake Charles, Louisiana, and Texas, must be the same for substantially the same distance. This is true, likewise, of all origins in Oklahoma. This relationship is found in Finding 8 in the citation above.

In Finding 10, in 208 I. C. C. 695, the Commission related the rates from Texas to Southern Territory to the rates from Oklahoma to Southern Territory by requiring that no less favorable basis of rates be established from Texas than was established from Oklahoma.

We sincerely hope that the Commission does not consider relating the rates to Southern Territory to those applying

to Gulf ports. To do so would require a modification of outstanding relationships in order that carriers might comply with the latest requirement.

[fol. 238] By Mr. Barron:

Q. Mr. Veale, do I understand that your experience in Texas by the elimination of the loading charge has meant an increase in the rail tonnage?

A. It is hard to make any comparison as to whether you have an increase in your rail tonnage. Market conditions, the amount of Government loans, the availability of storage, those things enter into the increase or the change of your rail movement. Our best indication as to whether our rates and regulations are encouraging the rail movement is to determine the best way we can as to the truck movement. Since we have not had this loading charge in effect, the truck movement has declined,—the truck movements into the transit points have declined. It is a considerable amount, but the bulk of that so moving is cotton which is near to a concentration point.

Q. You have the same rules in effect in Texas intrastate as you have interstate, have you not?

A. Yes, sir.

Q. And the intrastate application is by order of the Texas Railroad Commission?

A. Yes, sir.

Q. And have you examined the rule that is under suspension and applicable within the state of Oklahoma?

A. Yes, sir.

Q. Is it substantially the same as the rule applicable in Texas?

[fol. 239] A. I don't discover any difference in the character of the rules in the two states.

Q. But there is a difference in the territorial application, is that correct?

A. There is a difference there, yes, sir.

Q. Your rule in Texas will provide for the absorption of loading on traffic destined to New Orleans?

A. Yes, sir.

Q. And the one under suspension in Oklahoma does not?

A. That is my understanding of that rule.

Mr. Barron: I offer Exhibits 2 through 5 inclusive, and ask that they be received in evidence.

Examiner Archer: If there is no objection, they will be received in evidence.

(Exhibits Nos. 2 to 5, inclusive, Witness Veale, received in evidence.)

Mr. Barron: Do you have any questions, Mr. Bee?

Mr. Bee: Yes, sir.

By Mr. Bee:

Q. Mr. Veale, you don't understand that Finding 10 referred to by you in 208 I. C. C. has any relationship to the rate from Oklahoma, comparing to the rate from Texas,—it is the reverse of that, is it not?

A. Finding 10, as I read it, and as I think it is generally interpreted by the carriers requires that the Texas rates be treated so as to avoid any discrimination against the Texas [fol. 240] shippers, but it does not so provide for Oklahoma.

Q. It provides that there shall be no preference of Oklahoma and discrimination against Texas?

A. Yes.

Q. And does not provide there shall be no preference of Texas and discrimination against Oklahoma?

A. That is right.

Q. Whereas, Finding 8 applies between points in Texas and applies between points in Oklahoma?

A. Yes, sir, that is correct.

Mr. Bee: That is all.

By Mr. Barron:

Q. Finding 8 is a rate question and Finding 10 is really market competition as you interpret it, or is that right?

A. I interpret Finding 8 is a finding dealing with rate relationships, and I think Finding 10 is also one that deals with rate relationships but only runs to prejudice on the part of the Texas shipper.

Mr. Belnap: Finding 10 also runs to rules, regulations and practices, does it not?

The Witness: Yes, sir, it goes further and runs to transit privileges and is so being interpreted by the carriers.

Mr. Bee: I am not going to argue with this witness where they thought the change is in the rate or whether it is not.

Examiner Archer: I really don't think that we will get [fol. 241] anywhere with an interpretation of the Commission's finding at this time, anyway.

Mr. Barron: The witness is ready for cross examination.

Examiner Archer: Cross examine.

Mr. Mitchell: I would like to ask him a few questions first.

Mr. Belnap: Go ahead.

Cross-examination.

By Mr. Mitchell:

Q. I would like to clear up the points about which I asked the previous witness and I think I can do it this way: Will you specify or state for the record what destinations or ports do you have free loading from Texas origins?

A. Your question is as to what ports do we have free loading from Texas origins?

Q. What ports or destinations?

A. Under the Texas rule, we load cotton without charge to all Gulf ports, including the port of New Orleans. Now, we do not load any direct shipments to any other territory.

Q. So far as the tariff is concerned, the treatment with respect to New Orleans is exactly the same as to the Texas ports?

A. Yes, sir, that is correct.

By Mr. Thornton:

Q. In your Exhibit No. 4, you gave some figures as to total bales originated on The Panhandle & Santa Fe for the period shown, 346,000 bales. Have you got that same [fol. 242] information for the Gulf, Colorado & Santa Fe?

A. No, I didn't have time to get the Gulf, Colorado & Santa Fe figures.

Q. Mr. Barron asked you if you had not established this same free loading rule in Texas by order of the Texas Railroad Commission. Was that by voluntary application of the carriers to the Texas Railroad Commission?

A. That is right; we applied for the authority.

By Mr. Belnap:

Q. In what tariff is your Texas rule carried?

A. The Texas-Louisiana Lines' Tariff 71-F, I. C. C. No. 480, Agent Ira D. Dodge. It has now been changed, it is

Texas-Louisiana Lines' Tariff 71-F, Agent Ira D. Dodge's I. C. C. No. 507.

Q. There is a rule in that tariff providing for the free loading of cotton by carriers and it has as broad application as the tariff itself, does it not? Does it extend to every rate contained in the tariff?

A. As far as I know, it does. I believe it does.

Q. Is that true of the rule under suspension published in Southwestern Lines' 208?

A. No, that rule in 208 only runs to a portion of the destination territory involved.

Q. And that 208 has the carload rates from Texas to destinations east of the Mississippi?

A. Yes.

Q. Other than the Port of New Orleans?

[fol. 243] A. Yes, sir.

Q. And it says all carload rates from Oklahoma to all destinations, the same as from Arkansas?

A. Yes.

Q. The exhibit which you are to supply for the record covers what period as to the truck movement to Houston?

A. It covers the period August 1, 1939 to February 1, 1941.

Q. And it was in that period that between 18 and 19 thousand bales of cotton were trucked from certain counties in Oklahoma to Houston?

A. Yes, sir.

Q. Does that purport to show the entire truck movement from Oklahoma to Houston?

A. No, sir, the exhibit shows that it only covers 85 per cent of the movement because certain firms in Houston would not release their figures to the Houston Port and Traffic Bureau; and, of course, it does not include the truck movement to any other destination other than Houston.

Q. Since the period covered by that exhibit, have the carriers made substantial reductions in their rates from Oklahoma to Houston?

A. We made some substantial reductions on June 20, 1940.

Q. What was the extent of those reductions?

A. I think the maximum reduction was 13 cents; of course, in some of the territory, or a good part of the territory, it [fol. 244] was less than that.

Q. In Oklahoma it was less than that?

A. I am not familiar enough with it to say; I don't believe it was all reduced that amount.

Q. It was substantial in Oklahoma, the reduction?

A. Yes, sir.

Q. How did that affect the truck movement from Oklahoma to Houston?

A. I can't say; I haven't had any figures on the truck movement since this example I have referred to. We have tried to get these people to give us like information for later periods but we have been unsuccessful.

Q. You mentioned the fact that your Texas rule was protested when it was first filed with the Interstate Commerce Commission. From whom did that protest come?

A. That protest came from the Southwestern Compress and Warehouse Association.

Q. Was that protest grounded in any part on the contention that you had discriminated against certain traffic by leaving it subject to a loading charge and freeing other traffic from a loading charge?

Mr. Barron: Mr. Belnap objected to your reading any portion of that protest, and if his objection is good to one part of it, then my objection is good to the other part.

Mr. Belnap: I want to know what kind of a protest it was; [fol. 245] he says the cases were identical.

Mr. Barron: You said that it had no place in this record, and I didn't argue with you.

Examiner Archer: The objection was as to the statement of facts, and the position may be stated if the witness knows.

By Mr. Belnap:

Q. To make it short, Mr. Veale, I am in this case as a Protestant because the Oklahoma lines propose to remove the charge to the Texas ports and not to the Carolinas and the Southeastern Territory and lines. Was any similar point raised in the protest that you referred to?

A. I think that the real reason for the protest was that the carriers did not provide for the free loading of cotton on the facilities of the compress.

Q. And that was all?

A. That was their main contention.

Q. Well, didn't they have the point that I have raised in this case?

A. I don't recall any question like that arose.

Mr. Belnap: All right, that's all I have.

By Mr. Baumann:

Q. Mr. Veale, your Exhibit No. 4, in — you show the average per bale cost of loading to be 3.46?

A. Yes, sir.

Q. Can you tell me what those figures include,—what costs?

A. Those figures include—they cover what it costs us to get the cotton put into the boxcar by extra labor.

[fol. 246] Q. Actually out of pocket cost to the railroad?

A. Actually ~~what we pay these people~~. These costs on the Gulf, Colorado & Santa Fe Line are, in many instances, in many cases, 2 and 4 cents, and 2 and 5 cents,—that is, 2 cents for the bottom tier and 4 or 5 cents for the top tier. On The Panhandle & Santa Fe Railway we pay in nearly all cases 2 cents and 6 cents.

Q. Is that to outside labor?

A. That is to outside labor. We load some, but very little cotton with our own forces.

Q. In Texas?

A. In Texas. It is simply this: That it is better to hire some fellow and pay him 2 and 4 or 2 and 6 cents a bale, than to try and use some man we already have hired and who has some work to do, and particularly with the increased strain on the facilities due to the additional trains and all that stuff, we feel that it is better to use outside labor than to try to use a fellow that already has a job to do and then pay him 40 or 50 or 60 cents an hour.

Q. You pay this extra labor on the per bale basis, is that correct?

A. We pay them on the per bale basis.

Q. Do you find that has a tendency to delay the shipments?

A. (No response.)

Q. Of loading the shipments?

[fol. 247] A. No, sir.

Q. Do you have these men standing around available?

A. We have in each of our stations a man that loads cotton for us under contract; we contract with him to perform this loading.

Q. And the cost of this loading is in that contract,—this man is available—

A. Usually, he is a drayman in the smaller towns and is available to load this cotton and he has it ready when our train comes through to pick it up. Those details are all arranged with our station agent.

Q. I want to know what items are included in this cost statement. This is your contract cost?

A. That is the contract cost of loading the cotton into the boxcars, or put it on our platform and we put it into the boxcars for that figure.

Q. Can you tell us when you began absorbing the loading charge, approximately?

Mr. Barron: In Texas?

Mr. Belnap: Yes, sir, we are all speaking of Texas.

The Witness: The Texas rule became effective October 15, 1939 and intrastate on October 28, 1939.

Q. (By your Exhibit No. 5, in the column marked "total", I notice you indicate a reduction of 67,180,—is that the number of bales?

[fol. 248] A. That is 67,180 bales.

Q. In other words, that reduction is as between the period August 1, 1939 to July 31, 1940 and between August 1, 1940 and May 31, 1939, there was a reduction of 67,180 bales?

A. Yes.

Q. During the period that this reduction occurred in, you had this loading rule in effect, did you not?

A. Yes, sir.

Q. And during that period, you, according to Exhibit No. 3, loaded approximately 110,000 more bales than you did in the preceding period,—isn't that a fact?

A. Let me look at these exhibits.

Q. About 100,000, flatly, just make it 100,000 bales.

A. That is correct.

Q. You then paid out approximately \$3,500 more—wait a minute—about \$3,500 more to obtain this cotton?

A. In the first place, as the rule says, compare like with like; if you wish, you can say that from August 1, 1940 to June 30, 1941 the total figure, instead of being 319,221 is 346,338, so the reduction is not 67,180, and with another month added on to complete the comparison, the figure would possibly be about the same.

Q. Are you willing to admit there has been a reduction?

A. No, I will not admit that for the season as a whole.

Q. Will you admit there has been no betterment?

[fol. 249] A. No, I won't admit that.

Q. Your figures, however, tend to show that?

A. No, this Exhibit No. 5 is offered to show solely that the terminal movement has been different this year than last year.

Q. I understand the exhibit shows that, but you have the total handled there?

A. Yes, sir.

Q. And that is the total of all your movement, is it not?

A. Yes, sir.

Q. And it shows a reduction in spite of the fact you now absorb the loading charge?

Mr. Barron: Look at the period.

Mr. Baumann: Yes, but he says it possibly won't be any different.

By Mr. Baumann:

Q. Do you know anything as to the difference between the rail and truck rates?

A. In my territory, I know a little about.

Q. State your knowledge, approximately.

A. As much as you can determine how these truckers—

Q. We understand that,—state how much they charge the shipper, if you know.

Mr. Barron: I object to this, because this is not proper cross examination.

Mr. Baumann: He alleges that this business is going to the trucks.

[fol. 250] Examiner Archer: He may answer it if he knows.

Mr. Barron: If he knows?

The Witness: I will answer that question this way: That our rates in the tariff now have been designed to meet the competition of motor trucks from our origin in Texas to the ports.

By Mr. Baumann:

Q. They have followed the usual differentials between the truck rates and the rail rates, have they not?

A. Now, as to the—

Q. Have they?

A. I don't know what you mean by the usual differentials.

Q. Let's say the usual difference in amounts—

Examiner Archer: If you will get an answer before you put another question it would make a much better record.

By Mr. Baumann:

Q. Have they observed as the usual practice in establishing the rates on these points as they have on other points, distinguishing between rail and truck or truck and rail rates?

A. For instance, a man at Lubbock, Texas was handling cotton for 45 cents a hundred pounds by truck, and we would then put in a rate as close to 45 cents as we could get it, taking into consideration all of our Bureau operations that we have to go through and the committees and so forth.

Q. Do you know that it is a fact that the Government loan [fol. 251] cotton is trucked because the Government will not accept a freight bill?

A. As far as our interior concentration points are concerned, we have handled a lot of Government owned cotton by rail. The farmers or buyers for account of the farmers have paid the inbound transportation charge and it has gone into the concentration by rail with the freight bill behind it which could not be used by the farmers until they had some cotton shipped by rail.

Q. Does The Panhandle & Santa Fe serve any gins or compresses or platforms thereof by direct rail facilities?

A. All compresses on The Panhandle & Santa Fe Railway tracks are served directly by tracks but the gins, no.

Mr. Baumann: That is all.

By Mr. Belnap:

Q. What is the tariff in Texas which provides the inbound rates from gin origin to compresses?

A. Rates to inbound origins are carried in Texas-Louisiana Lines' Tariff 59 series and in Texas-Louisiana Lines' Tariff 71 series.

Q. 81?

A. If you want it for concentration, it is carried in that tariff.

Q. Which is what?

A. If the man designates it as inbound movement, he is going to ship it to Southern Territory.

[fol. 252] Q. What is the number?

A. Texas-Louisiana Lines' Tariff 81.

Q. I. C. C. number?

A. I. C. C. No. 530, Agent Ira D. Dodge.

Examiner Archer: Do you know the I. C. C. number of the others?

The Witness: I will get them.

By Mr. Beluap:

Q. The one that you just gave is the tariff that the cotton moves inbound on to be concentrated and to be moved to Southern Territory?

A. And it is so designated on the inbound shipments.

Q. In connection with the inbound rates in that tariff, is there a provision for free loading by the carrier?

A. Yes, sir.

Q. What is the item?

A. That is Item No. 435.

Q. So, so far as the tariff is concerned, as to this matter of charge for loading, you treat all directions alike?

A. Yes, sir.

Q. That is cotton moving in all directions alike?

A. Yes, sir.

Mr. Barron: The absorption in the loading rule in Texas is applicable for all lines operating in the state of Texas.

The Witness: The loading charge is applicable for account of all lines in Texas.

Mr. Barron: The elimination or absorption of the load-
[fol. 253] ing charge for all lines in Texas?

The Witness: Yes, sir, with the exception of this latest Frisco change, I believe.

Mr. Barron: That is not in effect yet, is it?

The Witness: No, but that is under suspension. The Q. A. & P. Railway has had an exception in this inbound rate item and in their tariffs or in these tariffs for a long period, even before other Texas lines removed the loading charge.

Mr. Barron: And the territorial application as to Texas loading charges is the same for all carriers, is it not?

The Witness: So far as I know it is; I don't know of any different application.

Mr. Barron: That is all.

Examiner Archer: Anything further?

(No response.)

Examiner Archer: Apparently not. You are excused.

(Witness excused.)

Examiner Archer: We will recess now until 1:45 o'clock today.

(Whereupon, at 12:30 o'clock p. m., a recess was taken until 1:45 o'clock p. m.)

[fol. 254]

Afternoon Session

1:45 p. m.

Examiner Archer: You may proceed.

Mr. Barron: Mr. Allen is the next witness.

HARVEY ALLEN was sworn and testified as follows:

Direct examination.

By Mr. Barron:

Q. Please proceed with your testimony, Mr. Allen?

A. My name is Harvey Allen. I am Assistant Freight Traffic Manager of the Missouri-Kansas-Texas Railroad Company of Texas, with headquarters at Dallas, Texas. I have been in the Traffic Department of the Missouri-Kansas-Texas Lines for more than thirty years, having been stationed at Saint Louis, Missouri, and Oklahoma City, Oklahoma, as well as at Dallas, Texas, and am familiar with the issues involved in this proceeding, and I am a licensed practitioner before the Interstate Commerce Commission.

The Missouri-Kansas-Texas Lines extend, insofar as any bearing in this case is concerned, through Oklahoma and Texas, generally in a north and south direction. Its eastern main line in Oklahoma passes through Muskogee, McAlester and Durant, Oklahoma into Texas at Denison, and thence on to the ports of Houston, Galveston and Texas City, as well as to San Antonio, Texas. Another line of the Katy in Oklahoma extends in a southwesterly direction from Par-

[fol. 255] sons, Kansas to Oklahoma City, passing through

Cushing, a compress point, and terminating at Oklahoma City, another compress point. Additionally, there is a line of our railroad known as the Northwestern Division, projecting northward from Wichita Falls, Texas, into western Oklahoma and passing through the compress points of Frederick, Altus, Mangum and Elk City, Oklahoma. The largest production of cotton in Oklahoma is in the territory adjacent to the Northwestern Division, between the points of Frederick and Elk City, Oklahoma.

Cotton traffic and its allied products has always constituted an important part of the Katy's tonnage, so that we are vitally interested in any action that affects the handling of this class of business.

Previous witnesses have dwelt in detail and at length, historically, with the necessities that prompted the carriers, in order to cope with truck competition, to bring about elimination of the loading charge on cotton in Texas.

Subsequently, after appropriate recommendations were made and advice supplied to all Oklahoma rail lines, as well as the shipping public, publication has been made, eliminating the loading charges on cotton in Oklahoma, as per Supplement 5, Southwestern Lines Tariff 208-G, J. R. Peel's ICC No. 3370, and supplement 15, Southwestern Lines Tariff 237-E, J. R. Peel's ICC No. 3307, both of which were filed to become effective on June 11, 1941. Due to protests made against cancellation of the loading charges, these [fol. 256] items providing for elimination of the loading charges, were suspended, occasioning this hearing.

(Exhibit No. 6, Witness Allen, marked for identification.)

The Witness: At this point I would like to offer in evidence, my Exhibit No. 6, which is a statement showing the number of bales of cotton originated by the Missouri-Kansas-Texas Lines in Texas, as well as in Oklahoma, during the period August 1, 1940, to June 30, 1941. The exhibit is self-explanatory, but I do want to particularly point out the fact that even with 53.6 per cent of the originated cotton being loaded by the carriers, or at the carriers' expense, the total cost therefor, on 53.6 per cent of the cotton, equivalent to 120,940 bales, was \$3,306.97. The average cost per bale was 2.73 cents. From the foregoing it will be noted that the expense in Texas, where we handle approximately three times as much cotton as in Oklahoma, has not reached

alarming proportions, being \$3,306.97. It is readily admitted this season is an abnormal one, but even under pre-war conditions the expense figured at an average cost of 2.73 cents per bale, can readily be justified from the advantages derived therefrom. When you consider not only the saving to the shipper, of the loading charge of 5½ cents per bale, approximately one cent per 100 pounds, as well as the more important factor of wiping out what can be styled the "nuisance essence" of requiring shipper to arrange for [fol. 257] such loading, I feel it is well demonstrated that the expense has been more than offset in helping us meet our highway competition. Whereas the truck competition on cotton is still acute, this effort, as well as others, to make it more attractive for the shippers to utilize the rails, has been fruitful.

I may add there in connection with the truck movement to Houston, the percentage that the trucks handled in this current season has dropped to 32 per cent as compared with 40 per cent for the same period of the preceding season.

Mr. Belnap: That is from Texas?

The Witness: That is from all origins into Houston.

Conditions with respect to cotton in Oklahoma are similar, and closely related to Texas. Assuming, therefore, that we would be called upon to load cotton in Oklahoma to the same relative extent as in Texas, viz., 53.6 per cent, the cost for the total movement of bales originated in Oklahoma during the season August 1, 1940 to June 30, 1941, of 85,616 bales, at an expense of 2.73 cents per bale, would be \$1,252.80 for the period in question. Admitting that, as in connection with the Texas movement, the Oklahoma one is, likewise, abnormal this year, the total handlings at the average estimated cost of 2.73 cents per bale, would not, in my opinion, be burdensome when considering the results following. Further, in a subsequent exhibit to be offered, it is shown that the total movement during the current season from Oklahoma on Katy-originated cotton, is not as great as [fol. 258] 45,890 bales shown due to conditions beyond human control. If the loading charge on Oklahoma cotton had been eliminated simultaneously with its cancellation on Texas cotton, and we had applied the cost to the actual Oklahoma movement, the expense would have been even less than that shown. May I repeat here, that considering the relatively small amount involved, and the benefits we

reasonably expect to receive from elimination of the loading charge in Oklahoma, as well as to remove any seeming discrimination against Oklahoma, our efforts are well worth while.

(Exhibit No. 7, Witness Allen, marked for identification.)

The Witness; I now offer in evidence, my Exhibit No. 7, showing details as to the destinations of cotton originated by the Missouri-Kansas-Texas Lines during the current season, August 1, 1940, to June 30, 1941, and the proportions moving to the various territories listed. Before world conditions became so disrupted, it was estimated that 90 per cent of our Texas cotton moved export through Galveston or Houston, and approximately 60 to 65 per cent of our Oklahoma cotton moved in the same channel. War conditions have changed this entirely, and even of the amounts shown as moving to the Texas ports this season, a considerable volume of that will subsequently be reforwarded to domestic mills in the southeast and Carolinas. The purpose of this exhibit is to bring out the obvious fact concerning the changed trends in Oklahoma and Texas cotton movements, i.e., the marked increase in forwardings to domestic mills that are moving on an all-rail basis and in connection with which the Katy haul is slight as compared with the handling to the Gulf Ports.

While the proposal as suspended eliminates the loading charge in issue only where cotton moves finally to Lake Charles, Louisiana, and to the Texas ports west thereof, we would be agreeable to eliminating the charge on all movements handled under rates in the Southwestern Lines Tariff 208-G, J. R. Peel's ICC 3370, if the Commission finds the suspended tariff has been justified.

By Mr. Barron:

Q. In other words, do you mean that you are willing to extend the territorial application of the rule insofar as the loading charge in Oklahoma is concerned to the same extent that you now have it in effect in Texas?

A. I have even made a broader statement than that, I think. As I understand—

Q. At least you will go that far anyhow?

A. Yes, sir, and possibly the whole hog.

Q. And from your experience in St. Louis and Dallas, do you find that the handling of cotton in Texas is substantially similar to the handling of cotton in Oklahoma?

A. We have always contended that.

Mr. Barron: I now offer in evidence Exhibits 6 and 7 and ask that they be received.

[fol. 260] Examiner Archer: If there is no objection, they will be received in evidence.

(Exhibits 6 and 7, Witness Allen, received in evidence.)

Mr. Barron: Do you have any questions to this witness, Mr. Bee?

Mr. Bee: Yes, sir.

By Mr. Bee:

Q. Your line operated about through the center of Oklahoma, the Eastern Central portion?

A. Yes, sir.

Q. Denison, Texas, is an important point in the northern portion of Texas on your line, is it not?

A. Yes, sir, that is our entry.

Q. And there are cotton compresses at Denison and Sherman on the northern boundary?

A. Yes, sir.

Q. Have you experienced any movement in the last two or three years, that is, cotton moving from Oklahoma to the Denison and Sherman, Texas, compresses?

A. Yes, sir, a great deal; not so much to Denison, but particularly to Sherman.

Q. Now, if a producer of cotton located at Durant or any point in the vicinity of Durant or north were to move his cotton south to Sherman, Texas, or to Denison, Texas, as contrasted with delivering it to your line under present conditions in Oklahoma, what would be the effect as to the loading charges?

[fol. 261] A. If he were to deliver it to us, as I understand your question, at a Texas point, he would be saved that penalty of the 5½ cent loading charge as published today.

Q. If he gave it to you in Oklahoma, he would have to pay it?

A. Yes, sir.

Q. And you operate also in the western part of Oklahoma, do you not?

A. Yes, sir, north of Wichita Falls.

Q. Have you found a movement of cotton by truck to Wichita Falls from Oklahoma?

A. Yes, sir, particularly from Grandfield.

Q. And it moves over the facilities at Wichita Falls, is that correct?

A. Yes, sir, where there are two compresses and three railroads.

Q. And when it gets there it may or it may not go out over your railroad, is that correct?

A. Yes, sir.

Q. And the same thing is true at Sherman?

A. Yes, sir.

Q. And the Southern Pacific Railroad is the shortest line from Sherman to the Houston port?

A. Yes, sir.

Mr. Bee: That is all.

Cross-examination.

By Mr. Bennett:

Q. If the suspended schedules are allowed to become effective, do you expect to load, free of charge, cotton delivered to your cotton platform or depot and moving on carload rates?

A. If any such thing were to come about, yes; but we don't handle the cotton in volume like the Panhandle & Santa Fe Railway does at their stations in the plains section of Texas. I don't know of any instance on our railroad at a non-compress point where as much as a carload of cotton is offered.

Q. You intend to do it?

A. Yes.

Q. Even though it moves under a carload rate?

A. Yes.

Q. Have you taken into consideration that you will pay the compressors an extra allowance or similar allowance for loading the cotton at the compress?

A. The rule is absolute and applies at points where the cotton is tendered to the railroad at its railroad facility, either the cotton platform or the station; it does not include

our cost of loading it at an industry served by a railroad such as a compress.

Q. Haven't you always considered a cotton compress a railroad facility?

A. No, sir, we have not.

Q. Wouldn't you find that in all cases, say, where it involves cotton?

[fol. 263] A. I don't; our situation shows that possibly in your territory there is a different situation which exists from that in our territory, but we do not, and never have. I may qualify that to this extent to say that we did have some contracts in a certain period with compressors covering cotton, but we don't have now, either in Oklahoma or in Texas.

Q. Did you testify as to the amount of free cotton delivered to the compressors in Oklahoma?

A. I did not.

Q. Do you know?

A. I do not.

Q. Have you any idea?

A. Only an idea.

Q. In your position with the railroad, wouldn't you have a pretty good idea of what that figure would be on a percentage basis?

A. I would say about 50-50.

Q. As a matter of fact, if this 50 per cent of the free cotton loaded at the compress by the compress company for cotton moving under a carload rate, wouldn't it be discriminatory for you to load cotton for a shipper and move the cotton on a carload rate over your platform unless you paid the compress for such allowance for the loading of the free cotton at the compress?

A. I wouldn't say.

[fol. 264] Mr. Barron: Don't answer that question, because that is a question for the Commission to say whether or not it is discrimination.

Mr. Bennett: He knows whether he would make the charge or not.

The Witness: So far as that is concerned, we would not assume the loading expense at the compress.

Mr. Bennett: But you would at your non-compress point.

The Witness: When it comes within the terms of the rules as published, tendered to us at our own facilities or at our freight station.

Mr. Bennett: That is all.

By Mr. Thornton:

Q. Cotton that is delivered to the compress platform, do you know if the owner or the shipper pays the compress for the services performed by the compress?

A. As I understand it, and as the tariffs I have seen, I don't think they are on file in Texas with anybody, they provide for what you might term a round key job for 75 cents,—perhaps they will allow receiving, sampling and a certain number of days of storage and the compression and the loading into a car.

Mr. Bennett: Do you know that for a fact?

The Witness: If they live up to the tariffs I have seen and have in my files.

Mr. Bennett: Will you submit a copy of the Compress [fol. 265] Tariff for the record, in order to show that it is not a round turn charge—the tariff will speak for itself, however.

Examiner Archer: Now, just how important is that?

Mr. Bennett: It is very important; they are proposing here to load cotton over a platform of theirs at a non-compress point, moving under a carload rate, and when the same free cotton is loaded at the compress point, they will not allow the compress any loading charge.

Examiner Archer: And as to the charge that the compress makes the shipper for that service, that has nothing to do with the railroad.

The Witness: Maybe I am out of order here, but can't Mr. Bennett who is interested in the compress side of it show what its tariffs disclose?

Examiner Archer: Yes, I think so.

Mr. Bennett: Well, I will be glad to submit that.

Mr. Bee: May I ask what compress company in Oklahoma or Texas is appearing here and protesting? Who is complaining as against a discrimination between the compress man and the shipper?

The Witness: They are not here.

Mr. Bennett: I submit to you that—

Examiner Archer: Let me ask you this: if the compress company delivers the cotton on the carrier's loading platform, wouldn't they absorb the charge for the loading then? [fol. 266] Wouldn't you load the ear then?

The Witness: Yes, sir, if they do that, we certainly will.

Examiner Archer: Then that is no different than any other shipper?

The Witness: That is absolutely on a parity.

By Mr. Thornton:

Q. I am very appreciative of your statement that you are agreeable to extend this absorption to all other destinations?

A. Yes.

Q. What is to prevent you from doing that now, or what did prevent you from doing that when this rule was being considered?

A. I think Mr. Jay, the previous witness went into that.

Q. And that is your testimony?

A. My answer is the same as his; wherever this proposal emanates from the Santa Fe originally will join, originally with them, and support entirely their position, in connection with such proposals.

Q. I take it that you wouldn't seriously object to a decision by this Commission approving this rule providing that you extend it to other destinations?

A. That is right.

By Mr. Belnap:

Q. Would you read into the record Item 121-A, which is the item under suspension in the Southwestern Lines Tariff 208-G, Agent J. R. Peel's I. C. C. 3370, and making it [fol. 267] plain to us?

A. Do you mean 121 or 121-A?

Q. Isn't it 121-A that is under suspension? Then it is Supplement 12?

A. You better give me yours (indicating).

Q. Making it plain when you read it what language would be eliminated from the rule to make the application of the rule as broad as the rate application of the tariff itself?

A. Item 121-A—

Mr. Barron: May I ask Mr. Belnap a question off the record?

Examiner Archer: You might put it in the record.

Mr. Barron: You want Mr. Allen to read this rule as it would read, you say, if the rules were made as broad as the rate's application in the tariff?

Mr. Belnap: That is right.

Mr. Barron: Now, Mr. Examiner, it just seems to me that we are going a little beyond the scope of this proceeding here insofar as territorial application other than is now included. I do not believe that the Commission, under this procedure, could require the carriers to extend the application of the rule. We have stated without qualification in the record that we would have no objection to extending the territorial application, but it seems to be an inopportune time to ask a railroad representative to read into the record a rule that he construes as being a rule that all the car-[fol. 268] riers would concur in, and I don't think Mr. Allen would be able to do that.

Mr. Belnap: I ask him for the MKT Railroad.

Mr. Barron: No, you didn't do that either.

Mr. Belnap: Well, I will ask for the Katy Railroad, how the rule would read if you made the rule as broad as the rate's application in the tariff.

Mr. Barron: Well, if Mr. Allen wants to do that and take snap judgment on it, all right.

Mr. Bee: I object to the question as to the reasonableness and lawfulness of the rate.

Examiner Archer: If Mr. Allen wants to answer the question, all right.

The Witness: Item 121-A, loading of cotton at stations in Oklahoma on the MKT Railroad applicable only at points in Oklahoma on the MKT Railroad. When cotton is tendered to the carrier at origin on its depot or cotton platform, such shipment will be loaded by or at the expense of the carrier.

Mr. Belnap: I don't want to extend this record on the point that this objection has been raised to, but I consider this case to involve the Section 3 question as to whether what is proposed will create a discrimination between shipments moving in various directions.

Examiner Archer: Under the same circumstances and conditions?

Mr. Belnap: Within Section 3, and that question is always [fol. 269] here, and it is an issue as to whether the carriers have justified the proposal under that section.

Examiner Archer: Any other questions?

By Mr. Baumann:

Q. On your Exhibit No. 6, you show the number of bales originated as 225,000, that is on the MK&T of Texas in Texas, and the number of bales loaded as 120,000 plus?

A. Yes, sir.

Q. That is the loading since you have been absorbing the loading charge?

A. No, the heading shows that that is for this current cotton season, starting August 1, 1940, and extending through June 30, 1941.

Q. And you have been absorbing the loading charge during that period?

A. I will have to qualify that by saying that the exhibit covers Texas and Oklahoma both; we have not been absorbing it in Oklahoma, but we have in that period in Texas.

Q. Now, how do you account for the fact that there were 225,000 bales, originated on your line, and you only loaded 120,000 for the shipper?

A. On account of the movement of cotton: the absorption of the loading charge applies, as this record is so replete with evidence, on shipments going to the Gulf ports, Lake Charles, Louisiana, and west. If you will refer to my Exhibit No. 7, you will find that in Texas, cotton there [fol. 270] moved to the Texas ports and New Orleans where the absorption will be made, 126,734 bales, or about 56 per cent; 38 per cent moved to the Southeast due to changed conditions, and 6 per cent to all other destinations where the loading charge is not absorbed.

Q. It is purely because it is not absorbed by your line and not because the shipper does not request the service?

A. He, as well as the railroad, has to be governed by the tariff, and the tariff restricts the absorption only to traffic to the Southeast.

Mr. Bee: Are you sure that you are not absorbing in Texas today the loading charges on cotton destined to the Southeast or Canada?

The Witness: We are absorbing it into New Orleans and under Concentration Tariff 81—in that case, we are, but not on direct shipments.

By Mr. Baumann:

Q. Have you noticed any marked decrease or increase in business since you have assumed the loading charge? Have you any figures to show your handling?

A. I think that is impossible to answer; I think that it has been an element that has been helpful, not—increasing, but in holding to our rail business.

Mr. Bee: Don't you think the difference between the amount that you absorb on, or that you do the loading of, and the amount that you do not is caused by the complaint that Mr. Bennett is making, that you are not absorbing a [fol. 271] charge or paying a charge on cotton loaded across the compress platform?

The Witness: That is very material, and also in our direct shipments, we now have through all rates to Central Freight and Trunk Line and Canadian and New England Territories, and the business is beginning to move, and we don't absorb it on that, and we have direct shipments to the Southeast and the Carolinas on which we do not absorb, and only when moving under the application of the Transit Tariff 81 that it is absorbed on the Texas business.

Mr. Barron: And over the railroad facilities?

The Witness: And over the railroad facilities at all times.

Mr. Bennett: On cotton from Oklahoma to the Texas ports and subsequently shipped by coastwise to New England, do you intend for the charge to apply on that character of cotton?

The Witness: The charge would be absorbed on that traffic because that does not move under through rates. So far as we are concerned, it moves on a rate from Oklahoma to the Gulf.

Mr. Bennett: Do you absorb it on direct shipments to New England.

The Witness: We do not at the present time.

Mr. Bennett: At the present time?

The Witness: No.

Mr. Bennett: That's all.

Examiner Archer: Any other questions?

(No response.)

[fol. 272] Examiner Archer: Any redirect examination, Mr. Barron?

Mr. Barron: No, sir.

Examiner Archer: You are excused.

(Witness excu-ed.)

Mr. Barron: That completes the Respondent's direct testimony in I&S Docket No. 4981.

Examiner Archer: Then we will hear from the Respondents in I&S Docket No. 4996.

Mr. Barron: May the record show that Mr. Allen's testimony was directed solely to I&S Docket No. 4981? That is correct, isn't it, Mr. Allen?

Mr. Allen: Yes, sir, that is correct, and that is the way I intend my appearance.

Mr. Baumann: But he referred to Texas and Oklahoma?

Mr. Bee: I will have some testimony in I&S Docket No. 4981 in favor of the Respondents, but I will also have some testimony following that, and I would prefer to put it all in at a later time.

Examiner Archer: Then you will follow the Respondents in this case.

Mr. Baumann: We will call Mr. Lallinger as the next witness.

M. N. LALLINGER WAS SWORN and testified as follows:

Direct examination.

By Mr. Baumann:

Q. Will you proceed with your testimony, Mr. Lallinger? [fol. 273] A. My name is M. N. Lallinger, Assistant General Freight Agent, St. Louis-San Francisco Railway, St. Louis, Missouri. My services with the Frisco began 28 years ago as an accountant claim investigator, Chief Clerk, Overcharge Claim Department, and Traveling Auditor.

In 1935, I was transferred to the Traffic Department, principally handling cotton matters.

I appear here as a protestant in I&S Docket No. 4981, suspending items published in Peel's ICC No. 3307 and ICC No. 3370, and as Respondent in I&S Docket No. 4996, suspending item published in Dodge's ICC 507, MF ICC No. 5.

As Protestant in I&S Docket No. 4981, providing for free loading of cotton originating in Oklahoma, destined to Texas Gulf ports and Lake Charles, Louisiana, we emphatically oppose the publication of such a rule,—

First, because to provide for free loading of cotton to Texas Gulf ports and Lake Charles, Louisiana, and deny the same privilege to shippers of cotton to southern mills and other destinations is a distinct discrimination;

Second, the establishment of such rule on carload cotton traffic will have a tendency to spread it to other carload commodities now loaded by shippers.

Q. Do you now have free loading of other carload commodities?

A. If there are any, I don't know it; I wouldn't be qualified to answer that 100 per cent; there may be some cases where they do, I don't know.

Q. Proceed.

A. Third, the establishment of such rule in Oklahoma will naturally spread it into other states.

Q. What other principal cotton states are on the Frisco?

A. The states of Arkansas and Missouri.

Fourth, the term in the suspended item of its "depot or cotton platform" would be construed by compresses with which we have a bond and contract as meaning the compress facility itself, which, in reality, is our cotton platform for which we pay rental of \$1 for the term of the contract;

That there is no necessity of loading cotton free for the reason that by exhibits we intend to show that out of a total of 492,330 bales delivered to the Frisco in Arkansas, Missouri, Oklahoma and Texas for transportation only 12,798 were loaded by the carriers or 2.6 per cent.

Mr. Barron: Did you say for what period that was?

The Witness: I want to insert in the record right now, gentlemen, Mr. Examiner, rather, that all of the records I have made up is from July 31, 1939, up to August 1, 1940. We had those records available, and we didn't have time to work up the current season, and it is about the same, and it won't make any difference.

In view of the figures recited, we believe it unthinkable [fol. 275] that we should be forced to load cotton free of charge.

Prior to the establishment of the carload rates, the rates on cotton were generally considered any quantity rates, which ordinarily included cost of compression. When the carload rates were first established on August 29, 1932, the cost of compression was divorced from the rate.

In Peel's ICC 3307, M. F. ICC 41, Item 180, which was brought forward from the original issue, provides the following:

"Rates published herein do not include any allowance for compression, loading, unloading, topping, insurance or any other service of any or every description rendered by compressors, warehouses or similar facilities. Such services if any rendered, must be arranged and paid for by the consignor. No charges for any such service will be billed as advances against the shipment nor will carriers undertake to handle the collection or payment thereof from or to the consignor, consignee or other parties."

This palpably means that the establishment of carload rates on cotton was to deal with it as on other carload commodities.

At various intervals, the Frisco at stations in Arkansas, Missouri, Oklahoma and Tennessee provided for free loading of cotton when shipped in lots of less than 40 bales, and we then provided for a loading allowance to be made to shippers for such services. At the persistent insistence of several Southwestern carriers, we finally issued Supplement [fol. 276] ment to the St. L.-SF Freight Tariff ICC 10459, effective October 9, 1937, cancelling the tariff providing for free loading of cotton, thus making it a uniform practice to charge for loading.

Q. That is of all kinds of cotton?

A. That is right.

This method continued, and as a general practice, the charge for loading when performed by carriers was collected from shipper at origin.

During the latter part of 1936 and early part of 1937, the St. Louis Southwestern Railway was experiencing difficulty in collecting the loading charge from shipper at origin when such service was performed by it for the account of the shipper, and to remedy the difficulty, it published a rule providing for the collection of the charge at origin or the collection through carload transit arrangement.

The Memphis Cotton Exchange was successful in having the rule suspended, and in I&S Docket No. 4276—

By Mr. Baumann:

Q. Have you the ICC citation on that?

A. No, sir. I do not.

Q. It is 220 ICC 702?

A.—in which the Frisco Railway appears as a protestant which case was decided April 6, 1937, the Commission found as follows:

“Concisely stated, the question presented is whether as a reasonable practice the carrier should collect the loading [fol. 277] charges from the purchaser——”

Mr. Bee: Do we need to read from the report of the Commission?

Examiner Archer: We don't need to; have you the page reference there?

The Witness: No, I have not. Well, I will just jump that.

Examiner Archer: State it briefly in your own language.

The Witness: Yes, sir, that the Commission found it was not unreasonable to either collect through claim channels or from the shipper at point of origin and they did not think the loading charge itself was unreasonable.

Since the decision of that case, it has been our experience that practically no loading charges are paid at origin where the service is performed by the carrier.

At the beginning of this new method, it was quite difficult for the purchaser to learn when buying cotton accompanied by freight bills, if cotton was loaded by shipper or carrier, so the Frisco and other lines endorse freight bills with notation “loaded by shipper” or “loaded by carriers”. The latter notation permits shippers to make proper deduction for loading from invoices providing, of course, he receives the freight bills at the time of purchase.

Exhibits to be introduced later will show that practically all of the cotton tendered the Frisco is being loaded by shippers and eventually the so-called nuisance charge will eliminate itself.

Our claim department informs me they are having no difficulty in collecting the loading charges in transit claim settlements on the few bales that we are compelled to load and in each instance the freight bill is appropriately endorsed, giving purchasers of cotton full information whether shipper or carriers performed the loading.

On account of serious truck competition, the QA&P Railway, in Item 40-A, supplement 16, Dodge's ICC 438, effective October 12, 1938, removed the loading at Dougherty and McBain, Texas, and on April 24, 1939, proposals were

filed in both the Texas-Louisiana Tariff Bureau and Southwestern Lines Freight Bureau to remove all loading charges on cotton when delivered to carrier's depot or railroad cotton platform. Public hearings and executive meetings were held with the final results that the proposals were disapproved, whereupon certain carriers took independent action.

Mr. Barron: Did you say that they were disapproved in Texas? Didn't you include Texas and Oklahoma there together?

The Witness: I believe originally Mr. Barron, that it was disapproved in Texas, or, at least, withheld and not published immediately. If I haven't got the right facts it won't hurt this case a bit, I don't think.

Mr. Barron: It never was disapproved; and I don't think really that anything you have said so far will hurt the case. [fol. 279] The Witness: And I don't believe anything that you have said will hurt it either.

Mr. Barron: It was never disapproved in Texas, as a matter of fact.

The Witness: Well, I will stand corrected,—so you put it down that way, but it was disapproved in the Southwest.

By Mr. Baumann:

Q. You mean in the Southwestern Freight Bureau?

A. Yes, sir, in the Southwestern Freight Bureau.

Subsequent to the action of the Southwestern Freight Bureau, the Chairman of the Southwestern Lines Tariff Bureau, realizing the vast reduction in carriers' revenue this change would make, appealed the action of the carriers to Mr. C. E. Johnston, Chairman, Western Association of Railway Executives, Chicago.

Mr. Barron: I object to this statement, because it certainly has no place in this record, what was the interior workings of the carriers as to their program is of no concern whatsoever to the Commission in this case, and I object to the statement being made in the record.

Mr. Baumann: It is given to show some of the historical facts surrounding this controversy and it will be enlightening to the Commission.

Mr. Barron: The Commission can't take any such recognition of any appeal of such a nature as the witness has attempted to put into the record.

[fol. 280] Mr. Baumann: Do you know if it was appealed?

Mr. Barron: I don't deny that, but I say that it is certainly not pertinent here.

Examiner Archer: I don't see that it would serve any helpful purpose here.

The Witness: You don't care for it then?

Examiner Archer: No.

The Witness: Subsequent to the disapproval of this proposal in the Southwestern Freight Bureau, Mr. Alonzo Bennett, Vice President of the Federal Compress and Warehouse Company at Memphis, Tennessee, sent us the following telegram:

"Understand hearing to be held St. Louis tomorrow before Commissioner Johnston regarding controversy between carriers—"

Mr. Barron: I object to what was in this telegram; the Examiner has already ruled out this testimony about this matter being appealed to Mr. Johnston, and Mr. Bennett is here, and what this witness may testify to is certainly hearsay, and if Mr. Bennett wants to testify what he has said in the telegram, all right.

Examiner Archer: I haven't any idea what the telegram is about.

Mr. Barron: I have.

Examiner Archer: I will permit it to be read into the record subject to a motion to strike.

The Witness: The telegram reads:

[fol. 281] "Understand hearing to be held St. Louis tomorrow—"

Mr. Barron: If Mr. Bennett is going to read it into the record, why should you read it now?

The Witness: The telegram reads:

"Understand hearing to be held St. Louis tomorrow before Commissioner Johnson regarding controversy between carriers relative proposition railroad loading cotton moving on carload rates for shipper without charge stop under compress agreements we are furnishing railroads with depot facilities, and while we do not advocate charging the carrier for loading cotton moving under carload rates

nevertheless if railroad load cotton not only in compress towns but non-compress towns for shippers it creates rank discrimination against our company and under the circumstances if you do load cotton moving under carload rates we will expect you to either load similar cotton at our plants or make us an allowance commensurate with your cost for performing same service. Surely you will not permit this rank discrimination to become effective by publication."

Mr. Barron: I move that all of that telegram which has been read by the witness be stricken from the record because it refers to what may have been taken up with Mr. Johnson, which the examiner has ruled out, and certainly Mr. Bennett's interpretation of what might be discrimination or not is not pertinent here, that is the Commission's function, [fol. 282] and; third, it is purely hearsay on the part of this witness, and I move that the entire statement be stricken from the record.

Mr. Bee: And I move that it be stricken from the record, because it is wholly incompetent, and not irrelevant to any matter here before the Commission for consideration.

Examiner Archer: Do you want to make any reply, Mr. Baumann?

Mr. Baumann: You may rule on it, Mr. Examiner.

Examiner Archer: I sustain the motion to strike.

Mr. Baumann: I except to the ruling.

The Witness: Well, Mr. Examiner, I want to tell you that we feel that if this loading charge is spread into Oklahoma and we are forced to meet this competition that we will have to spread this into Arkansas and Missouri where practically all of the compresses,—I believe all of the compresses work with us under a bond and contract. I would like to read into the record now a letter that I wrote to our Vice President in regard to the operations between the railroads and the compresses.

By Mr. Baumann:

Q. That was the result of your own personal investigation?

A. Yes, sir.

Q. All right, proceed.

Mr. Barron: Before you read that, may I see what the contents of the letter is?

The Witness: No objection at all, Mr. Barron,

Mr. Barron: Why not make it in the form of an exhibit [fol. 283] instead of reading it into the record? May I just glance at it?

Mr. Bee: It is a self-serving document, isn't it?

Examiner Archer: Yes, sir, certainly, it is, but it is a statement he has made, and any statement that he makes is self-serving.

Mr. Baumann: It is a statement of his investigation.

The Witness: Well, if you don't want the letter in there, I will just read what it is all about.

Examiner Archer: If it were in the form of an exhibit, I don't think that it would be a question.

Mr. Baumann: So far as Respondents are concerned, I am perfectly agreeable that the reporter just copy it right into the record there is no use to read it all at this time.

The Witness: All right, you can just have it.

Here it is. (Indicating)

By Mr. Baumann:

Q. But the general tenor of that report was that it was much easier to handle——

A. I want that back for just a minute, I want to point out something here.

Examiner Archer: Off the record.

(Discussion outside the record.)

Examiner Archer: Make it in exhibit form and submit it within ten days after the close of the hearing.

(Witness Lallinger to furnish said letter in exhibit form within ten days from the close of hearing.)

[fol. 284] Examiner Archer: Now, point out what you want to.

The Witness: Under a bond and contract arrangement with the compress, the compress sets aside part of its facility, they take charge of all the inbound cotton on straight and shippers order lading and they collect our freight, in many instances they collect our freight charges for us.

For instance, at Memphis, Tennessee, where we handle hundreds of thousands of bales of inbound cotton, all we do is render a bill against the compress with copy of freight

bills and they pay us on a settlement every other day. We are permitted to go in there and examine all their records in connection with both rail and trucked cotton and find out weights and local dispositions, whereas under a compress not under a bond and contract arrangement, those things cannot be accomplished.

When we get a shipper's order shipment, for instance, we are required to take up the warehouse receipts and hold them as collateral.

We attempted to check our floating in rate, we check it to check our transit transfers and in Oklahoma we were denied the privilege of going in there to see what happened to our rail cotton.

By Mr. Baumann:

Q. That was at a compress with which you had no contract?

A: Yes. And we were finally forced to file suit in a Federal Court over there in the state of Oklahoma and finally [fol. 285] got a decision that we were permitted to go in there—

Mr. Bee: And in this exhibit that you have just introduced it has no reference to compresses in the state of Oklahoma, does it?

The Witness: No, sir.

Mr. Barron: Then, it is a fact that at the present time you can check the records under the injunction, can't you?

The Witness: It will be an exhibit.

Examiner Archer: Do you want to answer that question?

The Witness: Well, we can check it, but we have got a lot of trouble, we are not welcome down there if anybody wants to know, and they have got a lot of trouble in Texas too.

On October 15, 1939, in Item 40-A, Supplement 4 to Dodge's I. C. C. 480 and on October 28, 1939, in Item 40-B, Supplement 8, Dodge's I. C. C. 480, the loading charge in Texas was removed on interstate and intrastate traffic respectively.

We joined in that publication principally for competitive reasons and intended to withdraw if the privilege was to be extended to Oklahoma.

Our connections tentatively agreed that unless pressure was brought upon them they would allow the Texas rule to

stand and not spread the free loading of cotton to Oklahoma.

Just recently, however, the question arose whether finding 8 of I. C. C. Docket No. 26235, reported in 208 I. C. C. 677, did not make it obligatory to accord the same privilege [fol. 286] to Oklahoma, in fact to all Southwestern states, as to the state of Texas. This, of course, appears to be a controversial question and while we deny that finding 8 includes the loading charge, apparently our connection deemed it expedient to spread the free loading to Oklahoma. Rather than to meet this competition, we decided to restore the charge in Texas.

If this suspended rule is permitted to become effective, we will have a uniform method of charging for loading of cotton over our entire system.

We are firm in our belief that we have the right to demand that shippers load their cotton or pay us for the loading of it when such service is performed by us in connection with car-load rates.

Mr. Examiner, I have come to my exhibits now.

(Exhibit No. 8, Witness Lallinger, marked for identification.)

By Mr. Baumann:

Q. That is the exhibit or statement bearing your identification mark "F"?

A. Yes, sir, it is the document marked "Statement F", and it consists of three pages, showing the movement of all the cotton offered the Frisco at Oklahoma gin and compress stations for movement to compress stations for concentration and subsequent reshipment on carload rates.

Q. For what period?

A. I made that clear in the record, earlier, Mr. Baumann, that all of these exhibits deal with cotton moving October [fol. 287] 1, 1939, to July 31, 1940, and they are so marked on the exhibit.

Q. O. K.

A. It is shown that 91.4 per cent of the cotton was loaded by shipper and only 8.6 per cent loaded by the carrier.

Mr. Bee: Do you mean this is what we call country cotton, Mr. Lallinger?

The Witness: It means, Mr. Bee, just as the heading says—cotton originating at country points and compress points when concentrated and reshipped to another compress point. Do you know, cotton originates, for instance, at a gin point, Elgin, Oklahoma, for example, and would go to Chickasha, and we do have some Chickasha cotton that had prior rail service, and goes down to Altus, Oklahoma, and I included both of those in there.

[fol. 288] Mr. Bee: Now, take your first shipment shown on your Exhibit No. 8, Ada, Oklahoma, to Memphis, Tennessee, 950 bales?

The Witness: Yes sir.

Mr. Bee: That could have been billed on from Memphis and without unloading it could have been rebilled right on into the southeast?

The Witness: Yes sir, but it is not handled that way.

Mr. Bee: Would it cost him anything to take out another bill of lading?

The Witness: Yes sir, it will cost him reconsigning or switching or something if we had to deliver the car to the compress company up there.

Mr. Bennett: Will you please clear that up,—is it to be reconsigned?

The Witness: I haven't got the details with me, but this is cotton that was billed out of Ada, Oklahoma, from the compress facility there and billed to Memphis, Tennessee, for warehousing and unload.

Mr. Bee: This is not cotton that went over your platform facilities?

The Witness: No sir, it is not that kind of cotton; I am showing in this statement here the total movement of all the cotton that originated at gin and compress stations in Oklahoma going to another compress station.

Mr. Bee: Going to another compress station?

[fol. 289] The Witness: Yes sir, not through cotton at all, just compress cotton.

Mr. Bee: Would there be any difference in your handling at Ada of shipments destined to Memphis or a shipment destined to the southeast directly?

The Witness: No sir, no difference at all, it would be the same.

Mr. Bee: And if you put that in there, your percentage would be different?

The Witness: Yes sir, but I put all the cotton in there because I am assuming if this scale becomes effective I am going to have to pay for such loading.

Mr. Bee: I understand you now.

The Witness: Mr. Examiner, that is a total bales of 51,525, of which 47,115 bales were loaded by the shipper; 4,410 bales were loaded by the carrier.

I submit for the Frisco to pay for loading of a commodity under such circumstances certainly would be a waste of revenue.

(Exhibit No. 9, Witness Lallinger, marked for identification.)

The Witness: I now submit my Exhibit No. 9, a statement being marked in the righthand corner "Statement B", and it contains four pages. This exhibit was prepared to show that out of a total of 51,525 bales of cotton handled by the Frisco that on 31,381 bales or 61 per cent, the rate from origin and compress station when destined to [fol. 290] the customary destinations, Houston and Galveston, Texas, is the same, excepting, of course, the standard transit charge as published in Item 390 of Peel's I. C. C. 3307. No transit charge, of course, of any kind, is assessed regardless of quantity when the distance for the inbound move is less than 50 miles or when the loading is in forty or more bales for a distance of 100 or more miles.

Since 61 per cent of the bales involved moved under the same rate, we certainly should not be expected to haul it free, and, in addition, to load it free.

(Exhibit No. 10, Witness Lallinger, marked for identification.)

The Witness: I now offer my Exhibit No. 10 marked "Statement G" in the upper righthand corner, and this exhibit contains three pages. This exhibit was prepared to show that out of 81 origins only 29 stations have facilities served by the Frisco track connection. On the balance or 52 origins, shippers were compelled to dray and load cotton into the cars.

The Exhibit further shows that 2,189 shipments, consisting of 33,377 bales out of 51,525 or 65 per cent, moved in lots less than 40 bales in 1,655 cars or an average of 21 bales per car.

It is our contention, in view of the service rendered, that we should not be compelled to load cotton free.

(Exhibit No. 11, Witness Lallinger, marked for Identification.)

The Witness: I now offer my Exhibit No. 11, being [fol. 291] marked "Statement H" in the upper righthand corner. This exhibit consists of one sheet and shows that during the 1939-40 cotton season, 19,591 bales moved under the so-called deferred shipment rule. The exhibit was prepared principally to act as a detail for the total amount of bales of cotton handled over the entire Frisco System.

(Exhibit No. 12, Witness Lallinger, marked for identification.)

The Witness: I now offer my Exhibit No. 12, consisting of one sheet, which is marked "Statement I" in the upper righthand corner. This exhibit shows that during the 1939-40 cotton season 15,679 bales of cotton moved direct from gin stations to consuming stations or destinations, and by consuming stations, I mean port and final destination of cotton, in uncompressed form. That is where this 35,000 pound minimum works.

This exhibit was principally prepared as a detail of the total amount of bales handled over the entire Frisco System.

(Exhibit No. 13, Witness Lallinger, marked for identification.)

The Witness: Now, I submit my Exhibit No. 13, being the document marked "Statement E" in the upper righthand corner, consisting of seven pages.

This exhibit shows the movement of cotton from Arkansas gin and compress stations destined to various compress stations. Out of a total of 261,457 bales handled during the 1939-40 season, 1,004 separate shippers loaded 253,078 bales or 96.8 per cent of the cotton was loaded by the shippers.

[fol. 292] The statement was prepared principally to act as a detail to show the total amount of bales of cotton handled by the Frisco System.

(Exhibit No. 14, Witness Lallinger, marked for identification.)

The Witness: I now submit my Exhibit No. 14, being a document marked "Statement J" in the upper righthand corner, consisting of five pages. This exhibit shows the movement of cotton from Missouri gin and compress stations to various compress points, and out of a total of 177,170 bales, only 9 bales were loaded by the Frisco.

By Mr. Baumann:

Q. All of these points mentioned are in Southeastern Missouri, are they not?

A. They run from—well, I didn't have time to put them in alphabetical order, but I will give you the list, it runs on our river division south of Eilbourn into Holland, Missouri, that is the last station.

Q. And they are immediately adjacent to the Arkansas stations that you referred to before?

A. Yes sir.

Q. And is it considered as one territory?

A. Yes sir, Southeastern Missouri and Northeastern Arkansas.

Q. And is considered as one cotton producing area?

A. Yes sir, and only 9 bales were loaded by the Frisco. In other words, 99.9 per cent were loaded by the shippers.

The statement was prepared to act as a detail to show the [fol. 293] total amount of bales handled by the Frisco.

(Exhibit No. 15, Witness Lallinger, marked for identification.)

The Witness: I now submit my Exhibit No. 15, being a document consisting of one page marked "Statement K" in the upper righthand corner. This statement shows the number of cars and bales in both compressed and uncompressed form forwarded direct from compress stations in Oklahoma, Arkansas, Missouri and Tennessee, to consuming destinations, that is where we have carload rates published in Peel's I. C. C. 3307 and in Steiden's 216 Series.

This statement was prepared principally to act as a detail in a recapitulation of all the cotton handled by the Frisco System.

(Exhibit No. 16, Witness Lallinger, marked for identification.)

The Witness: I now submit my Exhibit No. 16, being a single sheet, marked in the upper right-hand corner "Statement C".

There is an error in that statement, gentlemen, and if you will pick the third item, which shows Dorchester to Sherman, in the first column it shows 150, and in lieu thereof in the first column put 50, and in the second column put 50 in lieu of the 150 which is there now. The sum of the bales is correct.

This exhibit shows information gathered by our Texas Line office and covers cotton originating on our Texas Lines stations destined to compress points, not to any consuming point, and it reflects a total of 2,278 bales, all of which were [fol. 294] loaded by the shippers regardless of the fact that we didn't have a loading charge down there.

Mr. Barron: Are these carload shipments?

The Witness: No, they are going into compress points; I don't know how they moved out; I didn't have time to get it; I couldn't get any movement from Denison and Vernon—I did get Vernon to Frederick but these are bales that went into Dallas and Denison and Sherman for concentration.

By Mr. Baumann:

Q. These are all less carload lots?

A. Yes sir, all less carload lots going into those points.

We were unable to get complete information as to direct mill shipments and, therefore, unable to furnish the number of bales. However, it must be assumed that whatever cotton we did get from Denison, Sherman, Ft. Worth and Dallas would naturally be carload cotton and under existing conditions would have been load- by the shipper.

(Exhibit No. 17, Witness Lallinger, marked for identification.)

The Witness: I now offer my Exhibit No. 17, consisting of one page, marked "Statement D" in the upper right-hand corner.

There is an error in this statement under Dorchester again, please change the 150 to 50 and the total in the first column should be 2178 and the total in the third column instead of 2027, change that to 1927.

This exhibit was prepared to show that the average per bale and per car handled under forty bale lots and over [fol. 295] forty bale lots and regardless of the change, the average is okeh.

(Exhibit No. 18, Witness Lallinger, marked for identification.)

The Witness: I will now put in my Exhibit No. 18, consisting of one sheet, marked "Statement L" in the upper righthand corner. Exhibit No. 18 is a recapitulation from Exhibits 16, 13, 8 and 14. This shows the total amount of cotton handled in concentration service, that is cotton originating at the gins and compress points destined to another compress point.

By Mr. Baumann:

Q. On what lines?

A. On the St. Louis-San Francisco Railway for the 1939-40 season.

Q. And also the Frisco of Texas, is it not?

A. Yes sir, also the St. Louis, San Francisco & Texas Railway in Texas, and that shows that out of a total number of bales handled by the St. Louis & Son Francisco, 492,330 bales were handled, out of which 479,532 bales were loaded by the shipper or 97.4 per cent and only 2.6 per cent were loaded by the carrier.

(Exhibit No. 19, Witness Lallinger, marked for identification.)

The Witness: I now submit my Exhibit No. 19, consisting of one sheet, marked "Statement A" in the upper righthand corner.

This exhibit was prepared for a similar purpose that I prepared the Oklahoma statement, and that was to show where the origin and the compress rates were different; in the Texas case, the 93 per cent of the items show that there [fol. 296] is a higher rate from "Origin than from the compress station". However, the rates average from one to four cents for distances from 10 to 47.6 miles.

(Exhibit No. 20, Witness Lallinger, marked for identification.)

The Witness: I now submit my Exhibit No. 20, consisting of one sheet, being marked "Statement M" in the upper righthand corner.

This exhibit is a recapitulation of all the cotton handled by the Frisco System during 1939-40 season.

Item 1 covers cotton offered for concentration on the first concentration.

Item 2 covers cotton originally railed, or handled by Frisco Transportation Company's trucks and reconcentrated at another compress.

Mr. Belnap: Let me ask you about that: That would not include free cotton moving from one compress to another?

The Witness: No sir, that is where the second concentration took place,—originally railed into the first compress station and concentrated from there to another.

Mr. Belnap: You say from gin points to compress points?

The Witness: By gin points we mean this: That the first concentration, whether it comes from a gin point or compress point, it is the first rail movement of that cotton, is what it means.

Item 3 covers cotton moving under the so-called deferred [Vol. 297] shipment rule. If we were forced to pay for the unloading of cotton we would be compelled to pay twice on this class of cotton, first at the gin point and again when reloaded after compression at the compress point on the movement to destination.

Item 4 covers cotton which moved direct in uncompressed form from gin origins to cotton consuming destinations including, of course, such destination as the Gulf ports.

Item 5 covers cotton which moved direct from compress points to mill destinations and ports, which service is now being performed by the several compresses. Assuming that we did not care to change our bond and contract arrangement with the compresses for reason of the benefits we now derive from such agreements which might overshadow the cost of paying them for the loading or if we did change our contract terminating their services as our agents, they could dump the cotton on our platform and compel us to load or hire cotton loaders, we would be compelled under the terms of the tariff to perform this loading.

Assuming that in the final analysis we would be compelled to load all cotton, it would cost the Frisco \$88,986.48.

By Mr. Baumann:

Q. That is in loss of revenue it now receives?

A. That is right, based on a loading charge of 5½ cents per hundred weight.

Q. That you now collect?

[fol. 208] A. 5½ cents per hundred weight.

Examiner Archer: No.

The Witness: 5½ cents per bale which we claim would be a reasonable charge if we had to load compressed cotton in minimums of fifty and sixty-five thousand pounds, 41 foot cars are used, and cotton double-decked throughout the car. We, today, pay cotton loaders from 3 to 5 cents per bale for loading cotton with the exception of about ten points on the Frisco Railroad, we would be compelled to hire outside forces to perform this loading.

It is our belief that in view of the fact that all but 2.6 per cent of the cotton is now loaded by shippers, we should be allowed to charge for loading in Texas, and request that our suspended schedule be permitted to go into effect.

Examiner Archer: Refer to Item 5 on your Exhibit 20. Do you want to change that reference from "See Statement K" to read, "See Exhibit 15"?

The Witness: That is right.

Mr. Baumann: Mr. Examiner, I now offer in evidence Exhibits 8 to 20, both numbers inclusive, and I ask that they be received.

Examiner Archer: If there is no objection, these exhibits will be received in evidence.

(Exhibits 8 through 20, Witness Lallinger, received in evidence.)

Mr. Batts: I would like to clarify the record here a little [fol. 209] bit. This witness made some reference to the Cotton Belt and the interpretation as to one of the cases. I would like for the record to be clear that this witness is not speaking for the Cotton Belt in this case.

The Witness: That is right; I just wanted to use that to show at one time we had trouble in collecting the charges at origin and the Cotton Belt was successful in having that

changed, so that you can take it off, what is charged and show the freight bills are now endorsed "Loaded by shipper" or "Loaded by carrier", and you can now tell whether or not it was done at origin or destination.

Mr. Batts: I just wanted to get it clear in the record that you were not speaking for the Cotton Belt.

The Witness: That is right.

Mr. Thornton: The five items on your Exhibit No. 20, cotton moving to compress points, the figure 917,000-plus bales, does that include any of the cotton shown under Item 1, 2 and 3,—that 917,000-bale figure is shown under your Item 5 on your Exhibit No. 20?

The Witness: Yes sir, they are included in there. It is a double charge.

Mr. Thornton: That is all I want to know.

Mr. Beuap: Not a double charge?

The Witness: No, but a double handling regardless. Under Item 1, consisting of 492,300 bales, that could have [fol. 300] moved into Memphis, Tennessee, for instance, and then when you load it out, with the compress loading it today, I am assuming that I would have to pay them after it comes out of the compress.

Mr. Thornton: So that would be a double payment, at origin and at Memphis,—you are assuming that?

The Witness: Yes sir.

Examiner Archer: We will recess for ten minutes at this time.

(Short recess taken.)

Examiner Archer: You may proceed. Is the witness ready for cross examination?

Mr. Baumann: Mr. Bee perhaps has some questions that he would like to ask at this time.

By Mr. Bee:

Q. Mr. Lallinger, take your Exhibit No. 8, please, sir.

A. I have it.

Q. Have you any arrangements by which you would pay the compress at Oklahoma City today for loading cotton?

A. No sir.

Q. You show on this Exhibit 8, Page 2, 403 bales of cotton from Oklahoma City to Memphis?

A. Yes sir.

Q. If the rule which is in effect in Texas and which the Santa Fe and the Katy have proposed for application in Oklahoma were available it would be necessary for the com-[fol. 301] press at Oklahoma City to bring those 403 bales to your station before you would be required to pay for them?

A. Yes sir, because we don't have a bond and contract with that Traders Compress.

Q. And that would be true wherever the Traders Compress is in Oklahoma?

A. Yes sir.

Q. And it is the principal compress in Oklahoma?

A. Yes sir. There is an independent at Cushing, Chickasha, Elk City, but, Mr. Bee, we do have a bond and contract with the Joy Press at Chickasha, Frederick and Altus, Oklahoma, the same as we do with the Federal Union Compress.

Q. On your Exhibit No. 9 you show—

Mr. Belnap: Would you mind if I cleared up a point about this exhibit while we are on it?

Mr. Bee: Not the least bit.

Mr. Belnap: Is that cotton that you show on Exhibit 8 to a certain destination, is that from compress or is it possible that any of it is out of a gin?

The Witness: It could be from a gin or a compress.

Mr. Belnap: That is true for all stations on this page where compresses are located?

The Witness: I am not sure. Let me get to the detail here and I will show you. Which one of those are you talking about?

Mr. Belnap: I am talking about any of them on Exhibit 8, [fol. 302] can you tell us whether it is from a gin or compress for this exhibit?

The Witness: Yes, I can tell that by going to Exhibit 10. You can locate it that way. That will show whether it went in there in forty-bale lots or over forty-bale lots.

Mr. Belnap: Whether it went out, you mean?

The Witness: Yes sir, whether it went out and, in this case, to Memphis, Tennessee, the four shipments in there were four shipments over forty bales, and if you divide that, it was one hundred bales to the car, so that was a carload shipment from Oklahoma City to Memphis, and that had to come from the compress.

Mr. Belnap: And you were arriving at that from the data shown on Exhibit 10?

The Witness: Yes, sir, you can do it if you want to go into it that deep.

By Mr. Bee:

Q. Now, take the first line on your Exhibit No. 8, Ada, Oklahoma, to Memphis, Tennessee,—Exhibit 10, I mean, one shipment, one car, 28 bales,—that may have come out of the compress too?

A. Yes sir, it could have come out of a compress, but anything like nine cars, 922 bales, you would know that came from a compress and not out of a gin station at Ada, Oklahoma. That is what I meant by that.

Q. Let's take Cameron, is there a compress at Cameron, Oklahoma?

[fol. 303] A. That is a gin point.

Q. We have nine cars with 370 bales in them?

A. And divide that, and you will find about 60 bales in a car; and that could come from a gin point and not from a compress.

Mr. Bee: Is that all you have on that point, Mr. Belnap?

Mr. Belnap: Yes, I just wanted to be sure about that.

By Mr. Bee:

Q. Now, go to your Exhibit No. 9,—you show the difference in the rate from the origin station and the compress station,—that does not mean anything to the shipments actually shown on this exhibit, does it?

A. Yes sir, it means everything with the exception of a few stations like Memphis, Tennessee. The first station, Ada to Memphis,—I know you can't take cotton from Ada to Memphis and bring it back to the port, but later I will show you it will probably not be that much of a difference in the rate.

Q. So it would be in favor of the statement that I am trying to make?

A. I couldn't pick out these items, and I didn't have time to figure out the rates at all the groups, 201, so I just took Houston and Galveston because most of these shipments could have been destined to Houston and Galveston.

Q. But you would not have a shipment going from point of origin to a compress station where the rate was 12 cents higher from the compress point than the origin?

A. And if you wish, you can eliminate those two items [fol. 304] that you are attacking there, one where it is 10 cents and another 12 cents, you can eliminate those in Exhibit 9, you can eliminate those two shipments on the 10 and 12 cent rate.

Q. We could eliminate some more?

A. Yes sir.

Q. Frisco to Fort Smith, Arkansas, for instance, that can't move from Bristow, Oklahoma, to Fort Smith, Arkansas, and then to Galveston and Houston,—the transit is not open that way?

A. If you want me to check the rates for you, I will check them.

Q. No, but you know the location of Bristow on your line?

A. Yes sir.

Q. And you know where Fort Smith, Arkansas, is located?

A. Yes sir.

Q. And you wouldn't imagine that that cotton could move in Oklahoma from Bristow, Oklahoma, to Fort Smith.

A. If it were a 50-bale lot shipment, it could move over there.

Q. And go to Houston or Galveston?

A. Well, I don't know about that route.

Q. Well, that is what I am talking about.

A. I don't know about that.

Q. You would have to check your route tariff before you could tell anything about that exhibit?

A. Yes sir.

Q. Does Exhibit 11 clearly indicate that your handling in [fol. 305] Arkansas is considerably different than your handling in Oklahoma?

A. Yes sir.

Q. And there is no similarity in the handling in Oklahoma and the handling in Arkansas?

A. Mr. Bee, in Oklahoma, first of all, the majority of the gins are located on the highways; in Oklahoma, the majority are served by track connections and, naturally, if we can get cotton loaded by the shipper where he has to put it on a truck at his gin and bring it to our car, we certainly can expect it in Arkansas where we serve by track connections.

Q. You have entirely different conditions in handling, don't you?

A. No sir, we have the same rates, rules and regulations in Arkansas as we do in Oklahoma and Missouri.

Q. But is it the same handling?

A. You will have to make that a little plainer. Cotton is cotton. What do you mean by the same handling? I just told you.

Q. Then take your Exhibit No. 13?

A. I thought that you were talking about my Exhibit No. 11.

Q. I asked you the general question and I am trying to show you. Take your Exhibit No. 13 that shows your Arkansas origins?

A. Yes sir.

Q. Now, what is your companion exhibit for Oklahoma on that?

[fol. 306] A. I think that would be my statement "B", my Exhibit 9—no, that is not a companion statement, but I think maybe you will find that as Exhibit 10—that will about work out right, that is about the same, it shows the mileages and distances and whether service is by track connection and whether off-line and the number of bales.

Q. But you don't show the number of shippers here as you show on the other exhibit?

A. No, sir.

Q. If you took the number of separate shippers in Oklahoma and the number of separate shippers in Arkansas, you would find considerable difference, wouldn't you?

A. I think there are more cotton shippers in Arkansas than there are in Oklahoma; not any more producers.

Q. The general policy in Oklahoma is that the cotton moves to the nearest compress in Oklahoma?

A. In Oklahoma?

Q. Yes.

A. Yes, I think that is right.

Q. And there it is consolidated and moves out largely in carload lots?

A. That is right.

Q. Your position is that the rules and regulations relative to loading cotton free or with a price, that is with the cost to the shipper, should be the same in Oklahoma as in Texas?

[fol. 307] A. That is right. I want to charge carloading cotton all over; I am handling this cotton too cheap as it is.

Q. But you want the same rule and regulation in Oklahoma as you have in Texas?

A. No, I don't want that. I believe that if I could satisfy you, Mr. Bee, by taking these loading charges off, I would do it, but I can't do so because I have got somebody else hollering at me over in Arkansas and Missouri, and that is why I can't.

Q. Do you believe that the same conditions should exist in Oklahoma as in Texas?

A. Yes sir, I have got to answer that, I have got to say "Yes" to that.

Mr. Bennett: Is that likewise true in Arkansas vs. Oklahoma?

The Witness: Yes sir.

By Mr. Bennett:

Q. Coming right behind this statement that you think it would affect Arkansas, do you know how many bales of cotton you handled at West Memphis, Arkansas, this season?

A. No sir, I don't. If you want me to make a wild guess, I will do so.

Q. If I would say that it was around 85,000 bales in bound?

A. No, I think that is pretty high; if that is it; I know you know, of course,—

Examiner Archer: Don't put all that in the record.

By Mr. Bennett:

Q. What is the size of your own cotton platform at West [fol. 308] Memphis, Arkansas, or do you have any there?

A. We don't have any there that I know of.

Q. And does the Rock Island or the Missouri Pacific use your tracks in West Memphis?

A. Yes sir.

Q. And do they have a cotton platform there?

A. No sir.

Q. What do you use as your depot for the receipt of in-bound cotton at West Memphis?

A. The warehouse of the Federal Compress Company.

Q. Under a contract?

A. Yes sir.

Q. That would be likewise true of the outbound shipments?

A. Yes.

Q. If the compress should cancel this contract and you were forced to install facilities at West Memphis for the receipt and delivery of cotton, would it cause considerable congestion along your line, as far up as Blytheville, Arkansas?

A. That would be really a catastrophe so far as I am concerned. It really would be something.

Q. At Memphis, Tennessee, do you have a cotton platform?

A. No sir.

Q. And cotton at Memphis would be handled at West Memphis, is that correct?

A. Yes sir.

[fol. 309] Q. And the same questions would apply at Memphis as at West Memphis?

A. Yes sir. I tried to break that down with you out there, but I wasn't able to do it.

Q. And the station at Memphis is in the location that it has been in for a number of years?

A. Yes sir.

Q. And it is rather crowded?

A. I should say so.

Q. And industries are located all around your station?

A. Well, we just couldn't handle it because I tried to find ways and means to handle it but we can't handle it at all; we have to have your platform for our cotton.

Q. And at Blytheville, Arkansas, wouldn't the same questions apply?

A. Yes sir, equally true, with equal force and effect.

Q. And Portageville, Missouri?

A. Yes sir.

Q. Mr. Bee asked you as to the difference in handling cotton in Oklahoma and in Arkansas, and your answer was as to the same rules and regulations they were handled in the same manner?

A. Well, I will tell you, I would like to qualify that answer in this way: We have more compresses in Arkansas and Missouri than we have in Oklahoma, and that is about the only difference.

Q. Do your rules and regulations in Arkansas at any [fol. 310] point with contracts whereby the compressors are

to furnish you with facilities, have you had any appreciable amount of cotton to move from the compresses by trucks and barges?

A. Our auditors make a semi-annual check of the local disposition down there, and I don't think out of nearly five million bales handled in Memphis here we had over five thousand bales that were trucked out of there.

Q. And would that be likewise true of the territory?

A. Yes sir. Oh, at some compresses like Osceola and Blytheville where we handle about two hundred thousand bales, there is no trucking out of those compresses.

Q. By having the contract that you have with these compresses, in the busy season, does it permit your cars, during the harvesting of the crop, to move directly to the compress and be unloaded?

A. Yes sir.

Q. And they can be shuttled back and forth in that service?

A. Yes sir.

Q. And it causes an orderly movement of the inbound crop, is that correct?

A. Yes sir.

Mr. Bennett: That is all.

By Mr. Bee:

Q. Is there any station in Oklahoma where you do not have sufficient facilities to handle your cotton crop?

A. Not in Oklahoma, Mr. Bee. I think since the gins are [fol. 311] located off the tracks, the most of the places we could handle the cotton, but there are some, for instance, at Bennington, Oklahoma.

Q. Have you a compress there?

A. No. No, at the places where we have a compress we have the same thing there. I thought you said gin.

Mr. Bee: That is all.

Examiner Archer: Cross-examine.

Cross-examination.

By Mr. Barron:

Q. I don't understand in this proceeding that there is any item under suspension involving the elimination of loading charges in Arkansas, do you?

A. That is right; there is no proceeding here on that.

Q. Do you understand that there is anything in the Commission's decision in Docket 28235 that says anything about Arkansas vs. Oklahoma, or Texas?

A. Yes sir, I do.

Q. What is the finding?

A. Finding 8 goes back to Arkansas, all southwestern states.

Mr. Bee: No.

The Witness: Well, I will say I didn't know it.

By Mr. Barron:

Q. Have you read the decision?

A. I have read it, but I don't remember it.

Q. If it doesn't refer to Arkansas, then you don't want the Commission to understand that you are still protesting [fol. 312] the absorption of the loading charges in Oklahoma, do you?

A. No, I want the Commission to understand that we don't want it in Arkansas because we know it will spread to Arkansas.

Q. How long have you had it in Texas?

A. I believe I stated in my direct testimony—is it October, 1939—is that it? October 15, or what?

Q. Did you, as a representative of the Frisco, make any attempt from the time it was put in in Texas until after it was published to become effective in October, do anything to eliminate the rule in Texas?

A. After it was published, we made no effort to eliminate it.

Q. Now, if you should prevail insofar as your I&S Docket No. 4996 goes and should the Commission permit you to eliminate it Texas, interstate, what would you do about the absorption of your intrastate business?

A. I don't know that we handle any intrastate business.

Q. You don't handle any at all?

A. I say I don't know if we handle any intrastate business.

Q. If you did, what would you do about that?

A. If the Texas Commission would let us take it out, I guess we would have to load it free.

Q. Then you would have a discrimination, according to your idea, between intrastate and interstate traffic, wouldn't you?

A. I don't know; I don't handle the rates for the Frisco in Texas; that is published by the Ft. Worth office.

[fol. 313] Q. You know nothing about the Texas situation?

A. I know a lot of it, but I can't answer all of your questions.

Q. You gave as one of the reasons why you opposed the respondents in I & S 4981 was because no allowance was made on traffic going to the southeast?

A. That is from Oklahoma?

Q. Yes.

A. Yes.

Q. Did you understand the witnesses for the Santa Fe and the MKT to say that they were willing to put it into the southeast?

A. Yes sir, but I had this part of my testimony written up before I heard that.

Q. And if that is so, then that removes that part of your criticism, doesn't it?

A. Yes sir.

Q. And you said, as another reason why you opposed it, that it would spread to other commodities,—this absorption of the loading charges?

A. I am assuming that.

Q. How long have you been in the railroad business?

A. About twenty-eight years.

Q. Now, Mr. Lallinger, after that length of service with the railroads and your wide experience, what commodities do you think that it might spread to?

A. Oh, it could spread to canned goods.

[fol. 314] Q. Do you think that it ever would?

A. I don't know. You know some of them thought we would never have the pickup and delivery service, but we have it, it is with us now, and some of them didn't figure that we would ever have such a thing as that, and we got it.

Q. That is LCE?

A. Well, we didn't use to call for and deliver LCE even, but we have got it now.

Q. Do you speak, from your long years of railroad experience and as a representative of the Frisco that you are fearful that if this absorption of the loading charges were to become effective in Oklahoma that it might spread to other commodities?

A. Mr. Kuntz, our vice-president, is fearful of it. That is what he thinks about it. However, he is not here today.

Q. Well, I would like to ask him some questions about that.

A. Well, you can sure get him. You go by and see him.

Q. But I want to question him under oath. And you said that because of your contracts with the compress companies is another reason why you object to this arrangement?

A. Yes sir.

Q. Is there anything in your contract with the compressors that would prevent you from putting in a tariff, anything that would restrict it so that they couldn't be paid for the service unless it actually went over your facilities and not the compress facilities?

[fol. 315] A. Oh, I think that we could put something in the tariff like that, but it might cause some trouble. I showed what the compress does. I wanted to go into detail on this, and I would like to explain it a little further now.

Q. Sure, go ahead.

A. Well, take at Memphis, I remember when we had as high as fifteen cars being loaded there; now, that cost the compress company money to load that cotton, I know it does, because I watched them, and if this thing went into effect that could take this cotton that it was costing them something to load, they could take this cotton and put it over on our platform and say to us, "There is the cotton, and you load it", and I know that it would be cheaper for them to truck it over to our platform than it would be to load it on the cars, and if they did that, then we would have to load it.

Q. Do you mean to say that they would go to the expense of trucking it over there?

A. It would be cheaper for them to truck it over there than to load it into the cars.

Q. And how far would they have to move it in that instance?

A. I would say that it would be a distance of about ten blocks; but there are plenty of trucks over there in Memphis.

Q. Doesn't all of your contracts contain this provision

A. We will have a witness on the stand in a little bit to testify about this contract, if you will pardon me, and he [fol. 316] has read the contract through and through and can possibly give you quicker answers than I can, because

when you ask me anything, I will have to sit down and read that contract over, every item of it that you point or ask me about, and if you want to go to that trouble, I am willing to do it, because I have a lot of time here.

Q. No, but doesn't your contract provide in substance that the compress will be amenable to all of the tariff provisions effective from time to time as to the handling of cotton?

A. Yes sir, that is understood.

Q. And one of the other reasons was that you couldn't check the records at the compresses. You can do that in Oklahoma, can't you?

A. Well, we lost a lot of time in doing that. We can do it today; yes, I will just say yes, that is faster, giving you the answer "Yes".

Q. And then that reason of your objection is eliminated, isn't it?

A. Yes sir, I will just agree with you on everything and get through here.

Q. How many reasons did you have, five?

A. I have got them down here somewhere. You have got them down there, too, haven't you?

Q. No.

A. Well, let the Reporter go find them for you.

[fol. 317] Q. I have four of them listed here. Now, what is the other one?

A. Then, I will go find it for you, if you won't and the Reporter won't look it up, then I will.

Examiner Archer: The Reporter can't look it up now, he is busy.

The Witness: One of the reasons was because it provides free loading of cotton to Texas Gulf ports and Lake Charles, Louisiana, and denies the same privilege to shippers of cotton to southern mills and other destinations—

Examiner Archer: How many were there,—don't read them all.

The Witness: Well now, I will eliminate that one on account of what your witness said. There is about five left. And I could put down about five more, if you want them.

By Mr. Barron:

Q. Now, let's try to get these straightened out now. I am only talking about what you testified to in your direct examination?

A. All right.

Q. And I don't want to go in search of anything that you may have in the back of your head.

A. All right.

Q. Now, let's look at your Exhibit No. 15.

A. Are you through with these five points?

Q. Since you seemed to have so much trouble in finding [fol. 318] the five points, I am looking for the third one.

A. I have got it right here. I just don't want to have to go after it again. Here is one of them: "The term in the suspended item of 'Its depot or cotton platform' would be construed by compresses with which we have a bond and contract as meaning the compress facility itself, which in reality is our cotton platform for which we pay rental of \$1 for the term of the contract". Now, that is one of them.

Q. In the agreement there is a stipulation or a provision in the contract that it would be amenable to any of the tariff regulations, isn't that a fact?

A. Yes sir, of course.

Q. Now, in your Exhibit No. 16, you show the total number of bales from origins in Texas that were loaded by the shipper as 2,178, and none of them were loaded by the carrier?

A. Mr. Barron, I don't want you to think for a minute that I want to use this exhibit as a comparison with any line like the Panhandle and Santa Fe, or the MKT, because we just have a little bit of cotton down there, and for that reason we put the rule back in in Texas so as not spread it. Now, I thought that might save you some time.

Q. No, you have a line that originated 2,178 bales of cotton, and that is what I want to ask you about. You say that none of the bales were loaded by the carrier?

A. That is right.

[fol. 319] Q. Why was that?

A. Because it was loaded by the shipper, I just can't tell you why. I couldn't answer that really; the agents gave those reports, they just made them out and put it on there that way, each agent furnished a report to the Ft. Worth office, and it was sent on to me, and I really don't know the reason.

Q. You haven't been worried so much about the situation down in Texas where you have the rule in effect there, so

why is it that you are so concerned about that rule being put in effect in Oklahoma?

A. You know what I am so concerned about, because we are afraid that it will spread to Arkansas and Missouri, and we are not going to let it spread there.

Q. Well, you haven't been worried much about it down in Texas and you haven't hesitated to perform the service there?

A. We were — concerned about Texas at all; all we did was to ask our friendly connections not to extend it to Oklahoma, and they held off, I think, as long as they possibly could, until the boogerman came along and told you that you were going to hell unless you put these rates in in Oklahoma, and so you went and put it in the tariff and you want to put that thing in effect in Oklahoma now.

Q. But the boogerman didn't scare you about that, did he?

A. No, he didn't.

Q. Now, on your Exhibit 18, you show out of 492,000 bales [fol. 320] that there were but 12,798 bales loaded by the carriers?

A. Yes sir, that is what the exhibit shows.

Q. You had 4,410 bales in Oklahoma?

A. Yes sir.

Q. What tariff did you load those under?

A. 23rd, Peel's I. C. C. 3307.

Q. And you charged, of course, the tariff rate on those of 5½ cents a bale?

A. Yes, 5½ cents per bale providing concentration claims were filed; this cotton may still be in the compress down there for all I know, and not yet shipped out.

Q. From your experience in Texas, it appears that it wouldn't bother you greatly if this rule were put in effect in Oklahoma, would it?

A. Well, we would have to pay on 47,115 bales, pay the loading, or 91.4 per cent that we are handling today that is loaded by the shippers.

Q. Why would you do it in Oklahoma if you didn't have to do it in Texas on the 2,178 bales that you show on your exhibit in Texas?

A. I told you that we were fearful of the consequences.

Q. But that is not the question. That is not in answer to what I am asking you.

A. That is why we are not meeting the issue.

Q. You will answer this question if we stay here until winter.

[fol. 321] Examiner Archer: Just ask it once more. Don't argue.

By Mr. Barron:

Q. If you haven't been called upon to perform the service on the 2,178 bales in Texas, what makes you think that you would be called upon to perform the service on the 47,115 bales in Oklahoma?

A. I don't know if we would be compelled to load it, I don't know that. But you know different.

Q. On Exhibit No. 19, in the column headed "Difference in rate origin vs. compress station to Galveston and Houston"—

A. Yes.

Q. What is the purpose of that column there, may I ask?

A. The purpose of that column is the same as I made here in Exhibit 9, my statement "B", that is to show—ordinarily, I should not have presented this, because this kind of looks bad for the Frisco, on 93 per cent of the business we will get more money from the gin points than from the compress points, but that shows just how fair we are in doing this stuff. I tell you why I put that in there—on this shipment from Celina, Texas, to Dallas, Texas, 447½ miles when this shipped out to the Texas Gulf—I don't know whether it is or not—that may go somewhere else or to the southeast, and if it went to the southeast, we would haul it for nothing, but I don't want to take advantage of that rate and we get one, two and three cents more along here (indicating), and only two points in there, when the rates are the same [fol. 322] from the ginning and the compress points.

Q. Then you have assumed that all of this traffic moves to Houston and Galveston?

A. Yes, sir, I think so; that is where it belongs anyway.

Q. Now, your Exhibit No. 20?

A. Where is that?

Q. That is your last one, and it is identified as your "Statement M"?

A. Yes, sir.

Q. You show in the first item 492,000-odd bales and the total of 1,617,000 bales that you say would cost you if this rule were put in, in Oklahoma, approximately \$89,000?

A. That is right.

Q. Well, now, from Arkansas most of your gin points are located on your railroad, aren't they?

A. That is true.

Q. Would they haul it from the gin points to your station platform?

A. No sir, but I am going to commit myself in this record that if we are forced to pay for loading the cotton in Arkansas we are going to pay the gins that are on our tracks and pay them for it. We are going to make a loading allowance for the shipper, and you can put that in the record as a commitment, and if you are out wanting competition we will certainly give it to you.

Q. All right, if that is a threat, okeh.

[fol. 323] A. No, I am not threatening you.

Q. In Missouri, most of your gin points are located on the Frisco, is that correct?

A. Yes sir.

Q. And the same way in Oklahoma?

A. No, that is not right.

Q. Exhibit No. 10 indicates that quite a few of your gin points are located on your railroad?

A. I would say about 25 per cent are located on and 75 per cent are located off our railroad.

Q. If the rule that is under suspension in Oklahoma were put into Arkansas and Missouri, it would eliminate a great many of the over four hundred and some-odd thousand bales you would have to absorb it on, wouldn't it?

A. No, that is just your assumption and not my statement.

Q. They wouldn't haul this cotton to your station platform, would they?

A. We will have to change that rule; we couldn't use the same rule in Missouri as you have in Oklahoma. I go to these gin points about once or twice a year all over the system, and when we had the loading allowances back in 1937, these boys trucked the cotton and trucked it from their gins down to the compress points because we wouldn't make them a loading allowance regardless of the fact that they were on our property, and they said, "All right, you will pay this man who is across the street from your depot but [fol. 324] you won't pay me with my gin on your tracks"; so we had to pay those people, and if that condition would come up again where we would be forced to pay for our loading the cotton, we would have to pay these people.

cated on our property, and the record should so state, and we know what that is from past experience.

Q. If you put the identical rule into effect in Arkansas and Missouri as is contemplated in Oklahoma, it would eliminate about four hundred-odd thousand bales that you would have to make an allowance on, wouldn't it?

A. Yes sir, but we couldn't have a rule like that in Arkansas and Missouri, and I will qualify it that way.

Q. The tonnage shown in your Item 2 is also shown in your Item 1, isn't it?

A. Yes sir.

Q. Then, that is a duplication?

A. Yes sir.

Q. You understand that the rule in Oklahoma contemplates the absorption of any loading charge from compress point to compress point?

A. Yes, that is right.

Q. Is that right?

A. Yes.

Q. Now, as to your third item, for 39,000-odd bales, do you understand the rule will provide for the absorption of load-
[fol. 325] ing charges on that cotton?

A. Yes, your rule will load that cotton at origins, yes sir.

Q. Are you sure about Item 2, that that includes the compress to compress?

A. No, Mr. Barron, this statement was made merely on the assumption of what I think will eventually happen in the event we are forced to put your rule in that is under suspension in Oklahoma and put in an additional rule to fit our circumstances in Missouri and Arkansas,—that is what we will be required to have, and I don't know whether there would be a cent over or a cent less, and I am assuming that.

Q. And your statement on direct that if you had to put in the rule contemplated in Oklahoma, if you had to put it in in Arkansas and Missouri that it would cost you about \$89,000 must have an "if" behind it, must it not?

A. It will be this "if" in this way—if we put the rule in that you have in Oklahoma we will have to put the same rule in and modify it in a way in Missouri—experience has taught us that; it would be practically the same, and changed around a little—it wouldn't be any different, to speak of—we have gin platforms where you have depots and rail-

road platforms—one will be gin platforms where you have depot and railroad platforms—we would have gin platforms in there.

Q. You would extend the service?

A. We would have to.

[fol. 326] Q. Under the fifth item in your Exhibit No. 20; do you understand that the rule contemplates the loading of that 917,000 bales of cotton?

A. No sir.

Q. So when you cut out your duplications and when you eliminate these items that you have just testified to, you have really over-stated the amount that it would cost you, haven't you?

A. No sir, that is what I think. My statement is that on Items 1, 2, 3 and 4 and 5, that we would be handling a bale of cotton every time.

Q. But the rule in Oklahoma would not permit the absorption of the loading charges on the vast majority of the bales that you have shown in your Exhibit No. 20 under your Items 1, 2, 3, 4 and 5?

A. You know, just to get rid of you, I will say "Yes".

Q. That is all I want you to say. I was interested in the statement that you made that people were hollering at you about that rule that you put in. Whom do you mean were hollering at you?

A. What do you mean?

Q. When you made the statement, I think you were talking about the rule in Texas?

A. Do you remember me using the term that somebody was hollering at me, Mr. Examiner?

Mr. Barron: Yes.

[fol. 327] Examiner Archer: Oh, I don't know.

The Witness: I can't remember it.

By Mr. Barron:

Q. Who was it that was hollering at you?

A. I don't know who it was either.

Q. It was the Federal Compress, wasn't it?

A. I don't know.

Q. You know that Mr. Bennett was asking you about the movement by truck. Did you have in mind the movement from Arkansas and Memphis, or was it just from Memphis?

A. Well, I would like to have you state that question again? Will you state the question that you want answered, please? I just don't understand you.

Mr. Barron: Read it to him, Mr. Reporter.

The Witness: No, your question before that one.

(Record read.)

The Witness: I don't understand that question.

By Mr. Barron:

Q. Well, let me put it this way. Mr. Bennett asked you about a movement by truck, if there was any—and you said “No”—from compresses?

A. I don't remember that.

Q. He asked you a question anyhow and your answer was that there was no movement by truck.

A. Oh, you mean outbound shipments to mill destinations?

Q. Yes.

A. Yes, I said that is right.

[fol. 328] Q. And I got from your answer that it was because of the compress activity that there wasn't any truck movement, is that right?

A. Well, I don't know whether that is just exactly right or not; those people over there are very cooperative with us and we can go in there and check them anytime that we want to, and we can do that in Oklahoma now, too, but they are more of a sort of cooperative people to do business with, and we like them.

Q. The real reason that there is nothing moving by truck is because of your extremely low rail rate, isn't that the real reason?

A. Well, yes, that has lots to do with it.

Q. That is the real reason, isn't it?

A. Yes, but Mr. Alexander still thinks it is too high.

Q. But the low freight rate is the reason why it doesn't move by barge, too, isn't it?

A. No, I think it is because most of this cotton is tied up by inbound freight bills and they are afraid to truck the cotton out because we will collect the local rate; you people collect the local rate for 50 miles and throw the freight bills away, and we don't do anything like that over in Arkansas.

Mr. Barron: That is all I have, thank you.

The Witness: Thank you, Mr. Barron.

Examiner Archer: Any further cross?

[fol. 329] (No response.)

Examiner Archer: Any further redirect?

Redirect examination.

By Mr. Bennett:

Q. In Missouri, the cotton that is moved to Memphis is generally under the forty-bale rule loaded by the shipper and unloaded by the consignee and considered as a car-load?

A. Mr. Bennett, I will answer you this: If the cotton from Missouri goes to Memphis or West Memphis, Arkansas, where the distance is over 100 miles, yes, it would be loaded by the shipper and moved in forty-bale load lots.

Q. Do you have a loading charge on that now?

A. No sir.

Q. And if this proposed rule did spread, you would be required to pay them?

A. Yes sir.

Q. And in many instances, aren't the gins located right close to the cotton platforms?

A. Yes sir.

Q. At the stations?

A. Yes sir.

Q. And it wouldn't be much trouble to truck it over there, would it?

A. No sir, and they have done it already.

Examiner Archer: Anything further?

[fol. 330] (No response.)

Examiner Archer: You are excused.

(Witness excused.)

A. G. THAMAN was sworn, and testified as follows:

Direct examination:

The Witness: My name is A. G. Thaman; I am Assistant General Freight Agent of the Missouri Pacific. I have

been connected with the Missouri Pacific in the Freight Traffic Department since 1925,—that is 16 years, and before that time, I had a number of years experience with the Missouri Pacific and the Pennsylvania Railroad in rate work.

We are appearing here in opposition to the absorption or assumption of the loading expense at points in Oklahoma on the part of the carriers as will be explained in our presentation.

In connection with movement of cotton under carload rates in S. W. L. Tariff 208-G, Agent J. R. Peel's ICC 3370, and in other similar tariffs, varying rates have been published on minimum weights of 25,000, 50,000 and 65,000 pounds, applicable to the Gulf Ports, and on basis of 25,000, 35,000 and 50,000 pounds, applicable to Southeastern and Eastern Territories.

Examiner Archer: Just a minute. Aren't you a respondent in I. & S. Docket No. 4996?

The Witness: No sir.

[fol. 331] Examiner Archer: Are there any other respondents in I & S Docket No. 4996?

Mr. Barron: No sir.

Examiner Archer: May the record show that. Now, we are having the protestants proceed.

Mr. Barron: Yes sir.

Are you opposed to the rates under suspension in 4996 in Texas?

The Witness: We have no interest directly in that suspension.

Mr. Barron: All right.

The Witness: Now, the statement that I have just made is in connection with I & S Docket No. 4981.

These minimum weights apply when cotton is loaded in cars not exceeding 41 feet in length; higher minimum weights being provided when loaded in ears in excess of 41 feet.

Under the rules published in the tariffs, the minimum weight is applicable to the car used by the shipper, and the rules do not permit the substitution at carrier's convenience or otherwise of longer cars for the car ordered.

The minimum weight ordinarily determines the character of the cotton loaded under the carload rates; that is, whether "Flat", "Standard Compressed" or "High Density". "Flat" or uncompressed cotton usually moves under

the 25,000 and 35,000 pound minimum weights. "Standard [fol. 332] Compressed" cotton usually moves under the 50,000 pound minimum weight. "High Density", and in some cases "Standard Compressed", cotton moves on the 65,000 pound minimum weight. In order to load the required minimum weights, the cotton must be double-decked.

Spreads in rates as between the present minimum weights have resulted in much controversy between the interior and the Port cotton interests, and the present spreads are the result of hearings before the Interstate Commerce Commission.

Under the rules published in Consolidated Freight Classification No. 14, Agent R. C. Fyfe's ICC No. 27, Rule 27, Section 1, reproduced in Exhibit No. 21, shippers are required to load and unload freight received by rail carriers when moving at carload ratings or rates.

(Exhibit No. 21, Witness Thaman, marked for identification.)

The Witness: On LCL shipments of cotton moving into compress points for consolidation and compression under the transit tariff, or the so-called "Deferred Shipment" Rule, published in SWL Tariff 237-E, Agent J. R. Peel's ICC No. 3307, and SWL Tariff 208-G, Agent J. R. Peel's ICC No. 3370, charge of $5\frac{1}{2}$ cents per square bale or 234 cents per round bale is made when the carrier is required to load the shipment at origin and when through carload rate is protected under the transit tariff.

At present, the charge for loading may be paid at origin, or, if not, it is deducted from the concentration claim when [fol. 333] the expense bills are surrendered for refunds under the transit arrangement.

The present requirement that the shipper should load or pay the expense of loading shipments moving into concentration points was made because of the application of the through carload rates on all of this traffic, and to prevent discrimination against through shipments of cotton moving at carload rates from primary origin point to final destination.

Under the rules now under suspension in this proceeding, cotton would be loaded free by the carrier at points in Oklahoma when destined to Texas ports or to Lake Charles, Louisiana, while on similar shipments moving to other destinations, the loading would be performed by shipper.

or, if performed by carrier, charges would be in addition to the through rates. We know of no reason why the carriers should assume the loading expense when to certain destinations, and to require shippers to assume the loading expense when to other destinations.

In our opinion, the loading rule cannot be so confined. About 60 per cent of the cotton moving from compress points is so-called "Free" or "Local" cotton that has not received prior rail handling. It would be discriminatory to absorb the loading expense on so-called "Free" cotton tendered on carrier's depot or cotton platform and for carriers to refuse to perform loading on "Free" cotton when tendered [fol. 334] to the carriers on compress facilities where the loading expense would likely be less on compress facilities when compress labor is employed than when loaded on railroad facilities by railroad labor.

(Exhibit No. 22, Witness Thaman, marked for identification.)

The Witness: Under the existing contracts between the rail carriers and compresses in Arkansas, Louisiana and Missouri, typical of which is Missouri Pacific compress agreement applicable at all points on the Missouri Pacific in these states and as shown in Exhibit No. 22, the compress facilities become the carrier's facilities for the receipt and delivery of cotton. Therefore, under the contracts, the compress would automatically come within the rule, and the carriers would be called upon to perform the loading or make the compress an allowance therefor.

The proposed rule discriminates against gins which have supplied themselves with "side-track" facilities and in favor of "off-track" gins which would deliver cotton on carriers' station facilities, in that the loading would be performed by the carriers when from the "off-track" gins and not from the "on-track" gins where the gins usually load the cotton directly into the car.

Compresses at points in Arkansas, Louisiana and Missouri are already on record with the carriers that they will demand that the carriers assume the loading expense on cotton handled over compress facilities, if cotton is loaded [fol. 335] at carrier's expense when tendered at carrier's depot or cotton platforms.

If the proposed rules are established in Oklahoma, carriers will be faced with spread to points in Arkansas,

Louisiana and Missouri, where the compress agreements are in effect.

If carriers are called upon to absorb the loading expense at points in Arkansas, Louisiana and Missouri, it is estimated that cost to the Missouri Pacific Railroad alone would be approximately \$75,000 per year, based upon the bales originating at points on the Missouri Pacific in Arkansas, Louisiana and Missouri. This sum may be increased by the fact that much of this cotton would receive more than one transit privilege, in which cases the carriers would absorb the expense of second loading charge and, in some cases, third loading charge.

Furthermore, it would be difficult for the carriers to assume the burden of loading carload shipments due to the minimum weight requirements, and this would cause complications in the assessment of charges where carriers failed to load the required minimum on all of the cotton covered by one bill of lading. For example, certain shipper would tender the railroad on its depot or cotton platform, shipment of 70 bales of gin-pressed "Flat" cotton. This shipment would weigh approximately 35,000 pounds, and would move under the 35,000 pound minimum weight. It is possible to load 35,000 pound minimum weight of "Flat" cotton in a 41 foot car, having roof clearance of 9 feet or more, provided the bales are carefully gin-pressed, and [fol. 336] the loading is done shortly after gin-pressing and before the bales have had an opportunity to bulge.

In this illustration, after the carriers had begun to load the cotton, they may find that they could not get all of the cotton into the 41 foot car, and the carriers would be faced with the predicament of either allowing the shipment to move on basis of the minimum weight, assessing the LCL rate on the remainder, or allowing the remainder to move as a follow-lot shipment on basis of carload rate.

If carriers attempted to assess charges on any basis higher than the rate in connection with the 35,000 pound minimum weight, the shipper would likely contend that it would have been possible to load the entire shipment in a 41 foot car and that failure of the carriers so to do should not be charged to the shipper.

The practice of allowing that portion of the shipments which the carriers may be unable to put in the car to move as a follow-lot on basis of the carload rate would nullify the

principle of the carload cotton rate adjustment because the various rates and minimum weights in connection therewith are set in such a way as to determine the type of cotton upon which that particular rate is applicable.

The carriers would also encounter difficulties with respect to loading the required minimum weights where the cotton is tendered to carriers for movement sometime after compression [fol. 337] has taken place when the bales have a tendency to bulge or even where compression has not been carefully done.

What has been said with respect to loading under the 35,000 pound minimum weight applies substantially the same with respect to shipments moving under the 50,000 and 65,000 pound minimum weights.

By keeping the burden of the loading upon the shipper, this, of course, controls compresses and gins because they are of necessity required to perform the type of compression necessary in order to permit the shipper to obtain the benefit of the desired rate at the minimum weight loaded.

The conditions affecting the loading of carloads of cotton at carrier's freight facilities do not seem to be sufficiently different from those affecting the loading of other than bulk freight, particularly that which is packaged, to warrant practice of carriers in loading cotton free and not loading other carload freight. Loading carload freight by carriers entails difficulties and increased liability. It is feared that if established on cotton, it is likely to spread to other commodities moving in carload lots.

In our opinion, it would be difficult to confine practice of free loading of cotton by the carriers to points in Oklahoma on shipments destined to the Texas Gulf ports and Lake Charles, Louisiana. Eventually, the practice would be almost certain to spread to points in Arkansas, Louisiana [fol. 338] and Missouri on shipments for all destination territories, including Southeastern and New England points, to which most of the traffic is now moving.

If the practice spreads to include points in Arkansas, it could not well be denied at Memphis, Tennessee, from which point the Southwestern Lines participate in the handling of cotton traffic to the same extent as in connection with lines operating via routes east of the Mississippi River.

With the practice in effect at Memphis, Tennessee, it would be likely to spread further to include points east of the Mississippi River, thus eventually placing the burden on the carriers of the expense of loading all cotton originating in the southwest and southeast to all destinations.

The practice of free loading of cotton on shipments delivered to carrier at origin point on its depot or cotton platform originated with the Texas Lines, largely as a means of more effectively meeting truck competition from Texas shipping points to Texas Ports.

Mr. Bee: Now I object to that statement, Mr. Examiner; this witness says that he knows nothing about Texas and still he is going to tell why they did it; I object and ask that the statement be stricken as to why the Texas Lines put in the free loading.

The Witness: I made no statement about Texas.

Mr. Bee: If the witness is willing to stand cross-examination as to the practices in Texas, but he stated in the first of his testimony that he wasn't interested in the Texas situation.

The Witness: In the testimony here today we had the testimony from the Santa Fe as to what it was.

Mr. Bee: I renew my motion.

Examiner Archer: He perhaps can stand cross-examination.

The Witness: I want to explain this: That so far as the Texas situation is concerned that the Missouri Pacific now performs free loading but only because of the action of the other lines; we filed definite notice to meet their action. When I finish up here in a moment; I will explain that we are opposed to the free loading anywhere with certain qualifications.

Examiner Archer: Go ahead.

The Witness: Spreading of the practice to Oklahoma and to other origin points in the southwest and southeast would go far beyond the original basis for publication of the loading rule at Texas points, and it is our view that rather than spread the arrangement to include additional destination territory, the practice should be discontinued at all origin points, including Texas.

We have no objection to elimination of loading charges in connection with movements in lots of less than 40 bales from primary origin point to transit point for concentra-

[fol. 340] tion or other transit privileges provided the practice could be confined to such shipments, and if it did not meet with opposition from shippers of round-bale cotton and "Flat" or uncompressed cotton moving in car-load lots direct from shipping point to ultimate destination.

Examiner Archer: Does that complete your statement?

The Witness: Yes, sir.

Examiner Archer: Do you want to inquire?

Mr. Bee: Yes, sir.

By Mr. Bee:

Q. In this testimony, do you represent the Missouri Pacific Lines in Texas?

A. The Missouri Pacific Railroad.

Q. The Missouri Pacific Railroad?

A. Yes sir.

Q. What is the Missouri Pacific Railroad?

A. I represent the Missouri Pacific Lines.

Q. What do you mean by the Missouri Pacific Lines,—what do you mean by that?

A. The entire system, including Texas.

Q. Is that also the I&GN and the T&P?

A. It is the I&GN and the Gulf Coast Lines, including the Missouri Pacific Railroad proper.

Q. When you made that statement about it spreading if you started to loading cotton free in one place and that it would spread to another, didn't you know when that was [fol. 341] put in in Texas that it would spread somewhere else?

A. Yes sir, we were fearful of that.

Q. You could have kept it out then, couldn't you?

A. How?

Q. You could have refused to publish it on your own lines?

A. Well, we couldn't and meet the competition.

Q. What is that?

A. I said that we couldn't and meet the competition.

Q. Can you meet truck competition and charge a loading charge on cotton?

A. I believe you could, yes sir.

Q. Do the trucks charge for loading cotton?

A. No, but you can make your rate to meet that practice.

Q. Can't you make your rates to meet that practice and make them high enough to include the cost of loading the cotton?

A. Yes sir,—either way.

Q. You spoke of this compress contract or agreement, your Exhibit No. 22?

A. Yes sir.

Q. What compress in Oklahoma do you have a contract like this with?

A. We have no compresses in Oklahoma.

Q. I want to direct your attention to Paragraph (a) in Section 2 of this contract, appearing on Page 2 of your exhibit No. 22.

A. All right.

[fol. 342] Q. It provides there that cotton may be delivered by its owners to the compress company for account of the railroad and the compress company agrees when directed by the owner to load the cotton into the cars of the railroad company. Where, in your contract, do you make any provision where the owner does not direct the loading?

A. As to the interpretation of this contract, we have another witness who will answer about the amplification or the provisions of the contract and I can't answer that question for you.

Q. Do you know that you provide in another portion of this contract that any services whatever performed under Sub-division (a) of Section 2 of the contract that the railroad will pay the compress for it.

A. I will make the same answer to that, Mr. Bee.

Q. You introduced the exhibit, but you know nothing about it?

A. I don't say that I know nothing about it, but I can't answer the questions as to the actual application of the contract because it is not in my line.

Q. Do you feel that the loading charge on cotton, whether it be free, or whether it be taken off or whether it be put on, do you feel that it should be uniform in both Texas and Oklahoma?

A. We are in favor of uniform charges all over.

Q. Will you answer my question, please, sir? Are you in favor of and is it the view of the Missouri Pacific Lines [fol. 343] whom you represent that the practice of either

charging or not charging for the loading of cotton should be uniform in Oklahoma and Texas?

A. We have no particular views about Oklahoma; our only concern is that it will spread to Arkansas.

Q. You have no views as to Oklahoma?

A. No, sir, except we are opposed to it for fear that it will spread to Arkansas.

Q. Are you opposed to the Texas rule for the free loading of cotton for fear that it will spread to Arkansas?

A. Yes, sir, and we met it by definite notice—to meet the competition.

Q. You do have some lines in Oklahoma, don't you?

A. Yes sir.

Q. And you are today charging for the loading of cotton on those lines, aren't you?

A. Yes sir.

Q. And you have lines in the State of Texas, don't you?

A. Yes sir.

Q. And you are not charging for the loading of cotton on those lines in the State of Texas, are you, today?

A. No sir.

Q. Is it the view of the Missouri Pacific Lines that the practice of either loading the cotton free or at a fixed charge should be uniform in both Oklahoma and Texas?

[fol. 344] A. It is, yes sir.

Mr. Bee: That's all.

Mr. Barron: I have a few questions.

The Witness: All right.

Mr. Belnap: I have one or two more somewhat in the nature of direct and maybe I should go on.

Mr. Barron: Go ahead.

By Mr. Belnap:

Q. You expressed agreement with the thought that the carriers might perform, without charge, the loading of shipments moving in less than 40 bale lots?

A. Yes sir.

Q. Provided it should be held there?

A. Yes sir.

Q. What is that shipment that you referred to in less than 40 bale lots,—where did it start from and where does it finish up.

A. In going from the country points to the compressors, usually.

Q. In other words, it is the gathering service in connection with the cotton?

A. Yes sir.

Q. When there is such a movement by the railroad, is it not the invariable practice that that cotton, or cotton representative of that cotton, will move beyond the compress in a carload lot?

A. Yes sir.

Q. And after that movement takes place, the shipper of the cotton files a claim and gets the benefit of the car- [fol. 345] load rate from the country origin where the cotton started to, the final destination of the cotton?

A. That is correct.

Q. Do you not, as a matter of fact, perform more service, more railroad service in gathering that cotton into a compress direct from the gin origin to the final destination?

A. Yes.

Q. Do you not feel if there were made effective in any part of the territory in which you are interested, a free loading service in connection with this gathering service that in all fairness to the carload shipper who might be making his shipment directly from gin points to final destination, that that cotton would also have to be loaded free?

A. It would seem so, yes sir.

By Mr. Bennett:

Q. Now, right behind that, on the free cotton loaded by the compressors, it would be similar to the character of cotton he is asking about, would it?

A. No, that is right.

Q. And on your railroad that is quite a big percentage?

A. It is a big percentage.

Mr. Thornton: I believe you stated that you are not prepared to answer any questions on Exhibit 22.

The Witness: I am not prepared to interpret it.

Mr. Thornton: Suppose I deliver to you 50 bales of flat cotton on a compress facility that you have this contract [fol. 346] with and I instruct you to transport that 50 bales of flat cotton through to destination, flat, to one compress,—would this compress load that cotton into the

car for your account and what charge would the compress make against the shipper for that service or against you for that service? What charge would the shipper finally have to pay? He is acting as your agent and is performing the service that you hold out to perform at your own facility.

The Witness: I can't answer that and rather than give you a half answer, I will pass it up.

Examiner Archer: Do you have some more questions, Mr. Bennett?

Mr. Bennett: Yes, I did.

By Mr. Bennett:

Q. You heard the questions I asked Mr. Lallinger?

A. Yes sir.

Q. Would the same answers be substantially the same as to your railroad?

A. As to what questions?

Q. All of them.

A. Substantially so, yes sir.

Q. I am trying to cut the record down,—substantially the same?

A. Yes sir.

Mr. Bennett: That is all.

[fol. 347] Examiner Archer: Cross examine.

Cross examination.

By Mr. Barron:

Q. About this publishing of the rules in Texas,—are you referring to the Missouri Pacific Railroad or are you referring to the Texas Lines of the Missouri Pacific?

A. I am referring to the Texas Lines.

Q. You said they objected to the rule going into effect in Texas for application within the State of Texas intrastate as well as interstate?

A. Yes, sir.

Q. Who protested against the rule going into effect in Texas intrastate?

A. There were two, as I recall it offhand—we don't handle the Texas rates matters in St. Louis, but I do know something about them, but not all about them. As I recall it, though, Houston protested first, and the only protest to

stand was one filed by the Southwestern Compress & Warehouse Company, and that was denied by the Commission.

Q. Of the Southwestern Compress & Warehouse Company? Is that the Missouri Pacific Railroad? Is that the Missouri Pacific Railroad?

A. No.

Q. Well, you are appearing here for the Missouri Pacific Railroad, aren't you?

A. Yes. Getting around to your question, this compress [fol. 348] agreement which I filed here is in effect in Arkansas—

Examiner Archer: No, he asked you who protested it. And he told you who protested it.

By Mr. Barron:

Q. What protest did the Missouri Pacific Lines make to the establishment of the rule intrastate within the State of Texas?

A. Our protest was necessarily confined to this: We were opposed to the proposition when it was on the docket of the Texas-Louisiana Bureau and we have filed notice only after six or seven lines had filed notice to take that action.

Q. Don't you know that Mr. Roberts of the Texas-Louisiana Tariff Bureau testified before the Railroad Commission of Texas as to this rule for intrastate application, and there was no qualification to it?

A. That was after the notice had been filed by the member Texas Lines and they were acting as a unit then.

Q. When was definite notice given by the Missouri Pacific that they were going to do that?

A. I don't know.

Q. Could you furnish for the record, and take just as much time as the Examiner will give you, a copy of that definite notice?

A. I don't know whether I have it.

Q. You don't know that there was any such definite notice issued, do you? Isn't it true that there was never [fol. 349] a definite notice issued?

A. Well, I don't know.

Q. Do you know whether there was or not?

A. Our files indicate that several lines filed notice and we did the same.

Q. Don't you know that the interstate application for absorption of the loading charge was put in for all lines at the same time?

A. Yes.

Q. And why was any definite notice issued, and if so, when?

A. The interstate application and the state application, too, was filed after the definite notices were filed.

Q. And obviously filed for account of all lines,—all lines eventually concurred?

Mr. Belnap: I object to that on the ground of immateriality.

Examiner Archer: I agree with you. I think that we have gone far enough on that. I don't see that it is pertinent to it.

Mr. Barron: If you are going to rule that way, all right, but the witness has made certain statements as to the position of the Missouri Pacific in the establishment of the rule in Texas which is not in accord with the facts on file with the Railroads themselves.

Mr. Belnap: Oh, it makes no difference anyway.

Examiner Archer: I don't see that it makes any particular [fol. 350] difference.

By Mr. Barron:

Q. On what do you base your statement that the estimated cost to the Missouri Pacific would be \$75,000 per year if this rule were put in effect in Oklahoma?

A. On the number of bales of cotton originated in Louisiana, Arkansas and Missouri and Oklahoma for 1940.

Q. What is that?

A. That is based on the number of bales, and you can reduce that figure to bales right there, if you want to.

Q. How much a bale did you base that on?

A. At 5½ cents.

Q. Do you know that it would cost you 5½ cents a bale to load it?

A. We assume that it would; we don't know.

Q. In other words, you have simply taken the total number of bales that you handled, whether from the gin points or from the compress points, and multiplied it by 5½ and arrived at a figure of \$75,000 and yet you don't know how

many bales move from gin points to compress points or from compress points to compress points, do you?

A. No, sir.

Mr. Barron: That is all.

Examiner Archer: Any other cross examination?

Mr. Baumahn: No, sir.

* Examiner Archer: You are excused.

(Exhibits 21 and 22, Witness Thaman, received in evidence.)

[fol. 351] (Witness excused.)

T. M. SAVARY was sworn, and testified as follows:

Direct examination:

The Witness: My name is T. M. Savary; I am Assistant General Freight Agent of the Chicago, Rock Island & Pacific Railway with headquarters at Little Rock, Arkansas. I have been in the freight traffic department of the Rock Island for sixteen years, and I have had various other positions and experience in railroad rate work and freight traffic matters.

I want to make a statement of the position of the Chicago, Rock Island & Pacific in this proceeding. The Chicago, Rock Island & Pacific are now handling, with the view of having the same publication made for their account as has been made by the AT&SF, GC&SF, P&SF, Katy, KCS and Oklahoma Railway for Item 121-A; Supplement 12, Southwestern Lines Tariff, 208-G, J. R. Peel's ICC 3370 and Item 325-E, Supplement 18 of Southwestern Lines Tariff 237-E, J. R. Peel's ICC 3307, which publications are included in this proceeding in I & S Docket 4981. When publications are accomplished for our account, it is our intention to ask the Commission to suspend such publications and have the merits of the same determined on this record. Then the reason we are taking this action is in order to maintain our line on a parity with competing lines in Oklahoma.

[fol. 352] That concludes my statement.

By Mr. Bee:

Q. Your company has lines in Texas as well as in Oklahoma?

A. Yes, sir.

Q. And it is the opinion of your company whatever the rule may be or whatever the practice may be as to the charging or not charging for the loading of cotton, that it should be uniform in Texas and in Oklahoma, is that correct?

A. Well, not exactly, Mr. Bee. Our situation is a little different in Texas than in Oklahoma.

Q. Now, let's see—you have a line that runs practically through the center of the State of Oklahoma and enters Texas at about Ringgold, Texas, or Terrell, Oklahoma?

A. Yes.

Q. Do you know of any traffic or transportation condition that should cause a different condition in loading of cotton at Terrell, Oklahoma, or Ringgold, Texas?

A. Yes, the truck competition is greater on our line in Texas than it is in Oklahoma.

Q. Is there any greater truck competition at Ringgold, Texas, than it is at Terrell, Oklahoma?

A. Well, I would say possibly not at those two points.

Q. Would you say there was as much truck competition from your first station west of Sayre, Oklahoma, in Texas, to Dallas, Texas, as there is from Terrell, Oklahoma, to Texas?

[fol. 353] A. We have experienced very little truck competition out of the Sayre district in Oklahoma.

Q. I mean the Texas portion of it, across the line?

A. That is equally true out of the Panhandle.

Q. What is the name of the first station west of Sayre?

A. Shamrock.

Q. That is the first principal town, but the distance out there is some five hundred miles from Houston or more, isn't it?

A. Well, that is about correct.

Q. And about 340 miles from Terrell, Oklahoma, to Houston by your line?

A. That is about right.

Q. Do you know of any reason why you should have a different practice or a practice of not charging for the loading of cotton at Shamrock, Texas, and charge for the loading of cotton at Terrell, Oklahoma?

A. As stated a few minutes ago, our truck competition is different at Shamrock, Texas, than it is at Terrell, Oklahoma.

Q. Is it more or less favorable?

The southern part of Oklahoma, naturally, we encounter more extensive truck competition than we do in the Panhandle.

Q. And if truck competition forced the removal of the loading charge, it should be removed at Terrell, Oklahoma, before it is removed at Shamrock, Texas, if the truck competition was forcing it?

[fol. 354] Yes, sir, if truck competition was forcing it.

Mr. Bee: That is all.

By Mr. Bennett:

Q. Did you hear me ask the questions of Mr. Lallinger?

A. I believe I did.

Q. Insofar as the Arkansas territory is concerned, if I would ask you the same questions, would your answers be substantially the same?

A. I don't believe I recall the details of the questions. Would you mind stating that question again?

Q. I asked him several questions, and I am just trying to shorten the record. I asked you if you heard the questions and the answers, and if your answers would be substantially the same.

A. I would say substantially the same.

Mr. Bee: Do you mean at points in Arkansas that the CRI&F doesn't have sufficient facilities to handle the cotton?

The Witness: Our situation at West Memphis is the same as the Frisco and at Memphis it is the same as the Frisco.

Mr. Bennett: And at Forrest City, Arkansas?

The Witness: Yes, sir.

Mr. Bennett: And at Brinkley it is the same?

The Witness: Yes, sir.

Mr. Bennett: And at Little Rock, the situation is the same?

The Witness: Yes, sir.

[fol. 355] Mr. Bennett: And they are all on your line?

The Witness: Yes, sir.

Mr. Bee: Your company does not have sufficient facilities to handle the cotton crop?

The Witness: That is right.

Mr. Bee: And you have to depend on somebody else's facilities to handle the cotton crop, is that correct?

The Witness: Most of the time we do.

Mr. Bennett: That has been in vogue over a long period of years, isn't that correct?

The Witness: Yes, sir.

Mr. Bennett: In that section?

The Witness: Yes.

Mr. Bennett: And it evidently must be considered an economical feature for the railroads or they would discontinue the practice, wouldn't they?

The Witness: That is out of my line, but I imagine that the operating department would.

By Mr. Belnap:

Q. If the Commission approves the granting of this load-service without charge on traffic to the Texas ports and to Lake Charles, Louisiana, and you make it effective on cotton-moving in that direction, will you then be willing to eliminate the charge on cotton going to New Orleans and cotton going to domestic mill points?

A. I will answer that in this way: It is a matter that [fol. 356] will be decided upon by those who dictate the policies of our railroad, but my personal view is that we would.

Q. What does it cost you to load cotton?

A. It costs us an average of 5½ cents a bale to load it.

Mr. Belnap: That is all.

Examiner Archer: Cross examine.

Mr. Barron: I have no questions.

Examiner Archer: You are excused.

(Witness excused.)

W. G. DEGELOW was sworn, and testified as follows:

Direct examination:

The Witness: My name is W. G. Degelow; Assistant General Freight Agent of the St. Louis, Southwestern Railway Lines. I have had thirty-four years railroad experience in the operating, executive and traffic departments. I have been in the traffic department of the St. Louis, Southwestern Railway Lines for the last nine years.

The interest of the Cotton Belt in the schedules under suspension in I & S Docket 4981, notwithstanding their application to cotton traffic originating in Oklahoma only, is the fear that if they are permitted to become effective may result in the free loading of cotton throughout the southwest including Arkansas, Louisiana and Missouri. The suspended schedules provide that the originating carrier will [fol. 357] assume expense of loading all cotton tendered to it at its depot or cotton platform.

The Cotton Belt has consistently advocated the loading at its expense of less carload shipments of cotton for concentration or for compression and consolidation in transit so that it protests in part only the schedules under suspension in I & S Docket 4981.

Q. The Cotton Belt does not serve Oklahoma, does it?

A. No sir, it does not. The schedules under suspension in I & S Docket 4996 provide for the assessment of charges for loading all shipments of cotton tendered to the depot or cotton platform of stations of St. Louis San Francisco of Texas or just the exact opposite of what is provided by the schedules under suspension in I & S Docket 4981. The Cotton Belt, of course, is not concerned if the Frisco desires to make such charge but if uniform rules are developed as a result of these two I & S Dockets, the Cotton Belt protests the adoption of the tariff provisions under suspension in I & S Docket 4996 for uniform application as they provide charges for loading less than carload shipments of cotton when tendered at carriers depot or cotton platforms. The carriers' transit tariffs provide rules and penalties which vary according to whether shipments consist of less than 40 bales on the one hand, or 40 bales or more on the other.

It is our judgment that charging 5½ cents per square [fol. 358] bale at country points on less carload shipments moving into concentration points results in sort of a nuisance charge encouraging the movement of cotton by truck, especially since, as stated by the Commission in I & S Docket 4276, 220 ICC 701 Page 706, the rate contemplates loading by the carrier.

On the other hand, shipments of 40 bales or more, which are considered as carloads moving into concentration points are subject to more liberal transit rules and penalties, consequently, are not as susceptible to truck competition as are the smaller shipments available for move-

ment the same or shorter distances, and thereby may well be subject to loading by shipper or a charge if loaded by the carrier. Moreover, neither is there a reason for departing from the usual practice of requiring shippers to load carload shipments of cotton moving at carload rates from origin to destination. The conditions surrounding such movements are entirely different from those small shipments which move into concentration points or for compression and consolidation in transit on through bills of lading from origin to destination.

Q. In that connection, would it be fair to consider the 5½ cent charge in the nature of a transit privilege charge?

A. Yes sir.

Q. Proceed.

A. The loading of less carload shipments when offered at its depot or cotton platform by the carrier at its expense [fol. 359] does not create the necessity of making allowances to ginners whose gins are served by industry tracks for loading cotton at the gin. The rail carriers perform a switching serving in spotting cars at the gin. Furthermore, it relieves the ginner of the expense of bringing his cotton to the depot or carriers cotton platform.

Examiner Archer: I am not clear about this witness' position.

Mr. Batts: That is rather difficult to state. I had hoped we made it clear.

By Mr. Batts:

Q. Will you try it again, Mr. Degelow?

Examiner Archer: First, you say that you are in opposition to the Oklahoma proposal?

The Witness: In part, Mr. Examiner.

Examiner Archer: And that you consider the 5½ cents a nuisance charge?

Mr. Bee: He is opposed to the Frisco tariff.

Examiner Archer: One tariff makes the charge and the other does not.

The Witness: There are two tariffs involved here. We feel that a charge should not be made on less carload shipments of cotton moving to concentration or in less carload shipments of cotton moving into compression points for compression and consolidation. We do feel that the charge

should be made on cotton moving from origin to destination [fol. 360] without going through the compress point, or on cotton in 40 bales or more moving into concentration because of the different concentration rules in regard to 40 bales on the one hand and more than 40 on the other.

Examiner Archer: You would eliminate the loading charge on the initial move into a concentration point, is that correct?

The Witness: Yes, sir, on less than 40 bales.

Mr. Belnap: Well, it starts out as less than carload service, when the shipper comes to pay it, he pays for it as a carload movement from the first origin, does he not?

The Witness: Yes sir.

Mr. Belnap: He gets back what he pays on that LCL shipment?

The Witness: Well, he may or he may not.

Mr. Belnap: He gets that back and pays a through carload rate from the point of origin?

The Witness: Yes, sir; there might be twenty-five or thirty shipments—

Mr. Batts: And they may be the same or may not be the same as the rates from the compress points?

The Witness: That is right.

Mr. Bee: As I understand you, you would be agreeable to waiving the loading charge on shipments of 40 bales or less without spreading it to heavier shipments if that could be done?

The Witness: Less than 40 bales,—just that one bale difference there.

[fol. 361] Mr. Bee: Then it is correct to say less than 40 bales?

The Witness: Yes.

Mr. Bennett: Is that desired today?

The Witness: Yes.

Mr. Bennett: On the any quantity movement?

The Witness: No, if it moves out of the compress on the any quantity rate.

Mr. Bennett: If it moves out on a carload rate, you deduct it from the refund claim?

The Witness: If that is the same as changing it in that way,—that is the accounting method in getting it back.

Mr. Bennett: Do I understand your testimony that you are willing to eliminate that?

The Witness: Yes sir, on less than 40 bales moving into concentration.

Mr. Bee: If it does not spread to 40 bales or over?

The Witness: Yes sir, or spread to compresses, or to any carload shipments that move from origin to destination or to carload shipments from the compress point to destination, we don't feel like we should absorb that loading charge nor do we think we should absorb any loading charges where the shipments are loaded at the gin.

Mr. Batts: And you perform the switching service?

The Witness: That is right, and we perform the switching service.

[fol. 362] Mr. Bee: You are not testifying why there should be a difference in the rule in Oklahoma and Texas?

The Witness: No, I am not interested in Oklahoma.

Mr. Bee: Your only interest in the Oklahoma publication is your fear that it might spread?

The Witness: Yes sir, or the development of some rule by the Commission to apply to all traffic in the southwest, and this is what we think should be done.

Mr. Bee: And that same thing would apply to the publication of the rule in Texas?

The Witness: That is right.

Mr. Bee: Your position is no different as to Oklahoma as to Texas?

The Witness: Yes sir.

Mr. Bee: That is all.

Mr. Bennett: My question was that on the any quantity movement that is less than 40 bales into the compress and loaded carload at the compress, taking carload rate back to the originating point, you now charge the 5½ cents and get the money back by deducting from the refund claim?

The Witness: Yes sir.

Mr. Bennett: And it is your position that you are willing to abandon that?

The Witness: Yes.

Mr. Bennett: In other words, it is opposite from your last [fol. 363] I & S case?

The Witness: No, that was a method of collecting it, and that had nothing to do with whether the charge was proper.

Mr. Bennett: I am still confused.

Mr. Batts: Do you refer to this 202 ICC?

The Witness: In that case, the question involved there was how we were going to get the 5½ cents, not the question of whether we should have it but having had it, the Commission found our rule permitting us to deduct 5½ cents on the bale in settling our concentration claims was proper and reasonable, but it had nothing to do with the making of the 5½ cent charge, but having made it, it was the question of how to get it.

Mr. Bennett: You would not assess that charge?

The Witness: No.

Mr. Bennett: And you would not deduct it?

The Witness: No.

Mr. Bennett: That makes it clear, I think.

A. Cross examination.

By Mr. Barron:

Q. What is your estimated cost of loading this cotton in Texas on your line?

A. I don't know.

Q. Have you any idea, if this should spread to Arkansas, what it would cost the Cotton Belt?

A. No sir.

[Vol. 364.] Q. In any event, you don't want the rule eliminated in Texas, do you?

A. Well, we would prefer the rule or the method that I have stated here; that has been our position, that we should not pay the loading expense on any carload shipment.

Q. In I & S Docket No. 4996, that is where they are trying to eliminate the rule now that provides for the absorption?

A. Yes sir, we are in favor of that in part and in part we are not in favor of it.

Q. You are in favor of it?

A. 4981, in part.

Mr. Bennett: Is there a rule in the Consolidated Freight Classification to the effect that the shippers must load and unload carload freight?

The Witness: That is quite true, but we look upon this arrangement more or less as an incident to transit; we are granting transit; now, when you have a transit in a shipment, you have something different than when you have a shipment from origin to destination, you have something quite different there.

Mr. Bennett: If a shipper should tender you a carload rate of cotton to move at a carload rate from a non-compress point to move through to destination, would you load that cotton on a carload rate?

The Witness: We would not load that cotton without charge.

Mr. Bennett: Do you have such a charge today?

[fol. 365] The Witness: Yes sir.

Examiner Archer: Any other questions?

(No response.)

Examiner Archer: You are excused.

(Witness excused.)

(Discussion off the record.)

C. B. BEE was sworn, and testified as follows:

Direct examination:

The Witness: My name is C. B. Bee; I am Traffic Advisor and Special Counsel for the Corporation Commission of the State of Oklahoma which maintains a department especially for the purpose of looking after the interstate railroad rate matters in Oklahoma, and I am the head of that department and have held that position continuously since the 18th day of December, 1907, except for a period of time when I was on leave of absence with the Railroad Commission of Arkansas, and in a somewhat similar position, and again on leave of absence to the State of Missouri with the Public Service Commission of that State, in a somewhat similar position.

The Corporation Commission of Oklahoma filed with the Interstate Commerce Commission Docket No. 18932, alleging discriminatory rates on cotton between points in Oklahoma, from origins in Oklahoma and from origins in Texas to Texas Gulf ports.

That case was finally absorbed into ICC Docket No. [fol. 366] 17000, Part 3, Cotton, and uniform rates were fixed by the Commission for Oklahoma and Texas for distances above 320 miles. That 17000, Part 3, was finally absorbed into Docket 26235, reported in 208 ICC 677, where the carload rate structure came into existence.

In all those cases, the principal action of the Oklahoma Commission was to seek a uniform rate structure, uniform rules and regulations governing the movement of cotton from the northern portion of Texas and the western portion of Texas and Oklahoma; it being realized that for distance shorter than some 300 miles, or in the vicinity of Dallas-Ft. Worth, that the competition conditions were such that there could be different rules and regulations, and that was the view taken by the Interstate Commerce Commission largely in those cases.

In ICC Docket No. 26235, reported in 208 ICC 677, the Commission set out a finding 8 which we construed to mean that whatever the charge is from Texas there shall be a like charge from Oklahoma when consigned to the Texas Ports and to Lake Charles on interstate cotton.

Now, after the Texas rule became effective, I received numerous complaints, and our Commission did, and as head of the department, I received them, against the alleged discrimination brought about by no charge for loading cotton in northern Oklahoma and a charge in southern Oklahoma; and we had numerous complaints that cotton was moving [fol: 367] from southern Oklahoma into Texas and that the failure to charge a loading charge in Texas and to assess one in Oklahoma was partially responsible for it, the $5\frac{1}{2}$ a bale or $5\frac{1}{2}$ cents a bale, with that 10 per cent increase, could not, of itself, cause that change. But the cotton rates are graded upwards, and there is always a premium on free cotton, that is the country cotton brought by the owner to a compress point because no transit is necessary on that cotton, they don't have to match up expense bills to ship it out, or to put it in any particular lot or in any certain car to ship it out, and ordinarily there is a premium of about 50 cents a bale on such cotton. When you take a difference in the rate of one or two cents a hundred pounds which puts anywhere up to 20 cents a bale additional on it, that would be a four cent rate, and then take the $5\frac{1}{2}$ -cent rate, if the shipper finds it necessary, which he generally does in Oklahoma, to put the cotton in a truck in order to move it over to the first railroad station, he finds it advisable by reason of the premium on free cotton at the compress points, plus the difference in the slight group rate and the $5\frac{1}{2}$ cents charge for loading and unloading in Oklahoma and no such charge existing in Texas, to move that cotton south into Texas and load it there and thus prevent

Oklahoma handlers of cotton and the Oklahoma banking interests from having anything to do with the marketing and merchandising of that cotton, so it is our opinion that it produces a bad situation.

[fol. 368] Now, I have just finished a thorough investigation into sugar rates into Northern Texas and into Southern Oklahoma, and in connection with that investigation, I found it necessary to look into the highway conditions from a standpoint of travel on those highways, and I found that the highways were approximately the same in Oklahoma as they are in Texas, similar concrete highways, and for a haul of 400 miles from Houston to a point in Texas, the Highway conditions over which the trucks travel is approximately the same as to a point 400 miles in Oklahoma. We touch the border at some point around 320 to 330 miles, and then as they veer out to the East or West from a straight North point, they come to distances similar to the distances necessary to go into Oklahoma, and we find strong competitive conditions, involving the cotton rates.

It is my personal opinion, from my long study of cotton rates, having been engaged before the Interstate Commerce Commission in practically every cotton case for the last 20 years—that this is a nuisance charge on this cotton; I do not believe that it pays the rail carriers enough money to justify the loading of the cotton that actually comes to them by reason of the small amount of money, but regardless of that, it is the position of the Corporation Commission of Oklahoma that there are no traffic or transportation rules that would require any different rule, regulation, or rate, distance for distance, from Houston, Texas or from [fol. 369] any other port in Texas, but using Houston as a base port, were the haul from Houston of over 300 miles, there is no difference in transportation from Texas and Oklahoma, mile for mile, and, therefore, that the rules and regulations as to charges, mile for mile, should be uniform, as provided by the Commission in its Finding 8, in 208 ICC 677.

Examiner Archer: Do you see any merit in the Cotton Belt's proposal?

The Witness: I see a merit in it, but I see a lot of trouble behind it—just as they do, Mr. Examiner.

The constant question would come up, and if you take a less than carload shipment, or one bale down to the depot, send it over to a concentration point or compression point,

or 25 bales, or any amount less than the 40 bales that the Missouri and the Cotton Belt both speak of, if I might bring those two together, then, and say 39 bales,—and then it goes into the compress, and is rebaled, and then it goes out as a lot of sixty-five or seventy-five thousand pounds, we will say in lots of sixty-five or seventy-five thousand pounds, the rate basing back to the original point from which the cotton came—if the railroad would absorb that loading charge at the point of origin on the one bale or on the 39 bales in the car, it would appear to the shipper, I fear, that there would be a discrimination against him if he was shipping 200 bales in the same car, and had to pay the loading charge or load it himself. So, you have more reason for absorbing the loading charges at the origin point.

[fol. 370] The Witness: I am assuming that the cotton—

Examiner Archer: In other words, different circumstances and conditions, and consequently, Section 3 is out.

The Witness: But I am assuming that the cotton originated at the same point identically, that 39 bales or 200 bales originated at the same point, and moved to some other point for concentration, and when concentrated, moves to the same destination—we will say to Memphis, whereas, the 200 bales would move in a car directly from that origin point to Memphis.

Mr. Belnap: Right through the concentration point?

The Witness: Yes sir, right through the concentration point, and the only difference would be that it didn't stop and concentrate, and I was afraid that some shipper would complain bitterly of it.

Mr. Batts: Doesn't the concentration and the movement out in sixty-five thousand pound lots use the carrier's equipment to a better advantage, by heavier loading?

The Witness: No, the 200 bales from point of origin would contemplate as great use of the carrier's equipment as if we use the 39 bales.

Mr. Batts: You are talking about 200 bales of compressed cotton?

The Witness: You couldn't get 200 bales of flat cotton in a car, but I assume a shipment from Chickasha to Oklahoma City for second concentration or compression; that is what I am thinking of.

Mr. Batts: Wouldn't the flat cotton move out of Chickasha?

The Witness: Yes sir, it moves to Oklahoma City.

Mr. Batts: Wouldn't it move up there?

The Witness: Well, I will use 40 bales instead of 39.

Mr. Batts: In less than 40?

Mr. Thaman: If I may refer to it as forty bales or less.

The Witness: I meant to say less than 40 bales.

Mr. Degelow: Is it your judgment, or if it appears that the loading charge or the non-assessment of the loading charge on LCL cotton going into concentration would result in a discrimination, possibly, against a hundred bales moving origin to destination, then wouldn't it, if these privileges were granted under concentration, be subject to the same criticism?

The Witness: Yes, I think that is true.

Mr. Degelow: We wouldn't want to destroy our concentration privilege.

The Witness: I think there is always the charge of discrimination; I don't know whether it is a discriminatory charge, but there is no higher charge for the same service, no higher charge for the same or less service, whereas, if you attempt to put the lower charge on the 200 bales and not put it on the 40 bales or on the 39 bales moving in five and a fraction cars from Chickasha to Oklahoma City, and [fol. 372] then to Memphis, you would charge less money for that service than you charge for the 200 bales moving in one car at one time, from the same origin to the same destination, and there, I think you would have an unlawful discrimination, if somebody wanted to bring it up that you do not have now, since your rates are the same now, —you don't have any lower through charge.

Mr. Degelow: You would say that most of our cotton is handled under the concentration arrangement, as against the through movement from origin to destination,—the concentration arrangement is necessary in handling our cotton?

The Witness: I would say that concentration or substitution of free cotton as against the through movement from origin to destination, the concentration arrangement is necessary in handling cotton.

The Witness: I would say concentration or substitution of free cotton, that is, truck cotton or railroad cotton, which brings the same thing into effect. I think that concentration in some form or other is used in a large portion on all of the shipments. It would take quite a bit of segregation at the shipping points, at the concentration point, to weed

out 200 bales, in order to get the sixty-five or seventy-five thousand pound minimum in a single car, and it is much easier if we have the substitution of truck for rail cotton, to use the concentration privileges.

By Mr. Belnap:

Q. Before you came to this hearing, had you been informed that insofar as the movement of cotton from Texas to domestic mills was concerned, Texas is treated differently than Oklahoma?

A. Yes sir.

Q. In that the loading is free in Texas?

A. Yes sir.

Q. Did you make any representations to the carriers about that?

A. There was no representation that I could make to the carriers, except to ask them in a new proceeding to change it. I didn't know that that was true up to ten days ago, possibly a week ago, that is the first time I heard that the carriers in Texas were absorbing, were absorbing it, if we may use that term, or waiving the loading charge on domestic mill cotton.

Q. What is your position about that matter?

A. I think it is discriminatory, of course, just as much as the other is, except that I think the other is prohibited by the Commission's order in ICC Docket No. 26235, Finding 8, whereas, the other is just something to be taken up and get an order on.

Mr. Lallinger: How about Finding 10 on that?

The Witness: No, this Finding 10 and Finding 8 are very close. Finding 10 is against us having anything in Oklahoma lower than they have in Texas, and there is nothing in Finding 10 that keeps Texas from having 50 per cent better [fol. 374] than we have in Oklahoma, but if we get one penny the other way, Finding 10 takes care of that.

By Mr. Belnap:

Q. Regardless of what may be in force in Texas, if you want to have in Oklahoma, free loading of cotton, when destined to Texas ports, don't you think you should also have it when destined to domestic mill points?

A. I don't know that that is absolutely necessary, to have the same conditions both ways. As long as these charges

are often handled by the concentration claims, if that is the proper term for it, and the deduction there, I don't believe there is any discrimination or undue preference of 5½ cents a bale against this destination in the Southeast and a destination in Texas, for this reason: Both of those rates are unduly depressed rates, as the Interstate Commerce Commission looks at rates, and they are not on the same relative basis, the 5½ cents is merely a part of the through charge as the Commission said in Docket 27938, 245 ICC 11, which I received the day before I left my office. It covers grain, and the Commission found here that—let me see if I can find the portion that I want to read:

“That the practice of the defendant serving Minneapolis of including connecting lines' switching charges in the line haul rates on interstate movement of grain in carloads, from local or non-competitive points on their lines, within the origin states named to Chicago, while declining either [fol. 375] to include such charges in the line haul rates on such traffic from the same local or non-competitive points on their lines to Minneapolis or to absorb the connecting line switching charges at Minneapolis from such local or non-competitive points, is and for the future will be unduly prejudicial of Minneapolis and preferential of Chicago.”

Q. Thank you.

A. Now, carrying that out, I feel where the service is the same, and the rate is made under the same formula, that then to add a charge for spotting or loading, or anything of that kind is discriminatory, but where your rates are on an entirely different basis, and your traffic is moving in another direction, then it becomes only a question of reasonableness, in my opinion.

Mr. Bennett: Didn't they reduce the rates to ports last year, and the same reductions relatively were made to the Southeast?

The Witness: No, sir, not relatively. That is just exactly the point; the same reductions in cents per hundred pounds were made to the Southeast, but not relatively as to cost, I wouldn't say. If you will take your rate from Oklahoma to the Southeast, and the rates from Oklahoma to the Gulf, and measure them on a mileage basis, the rates from Oklahoma to the Southeast are much lower, and, therefore, I think that you might put 5 cents or 5½ cents a bale into the

[fol. 376] one rate, and not into the other, and still not have discriminatory conditions.

Mr. Bennett: Would the State of Oklahoma oppose the carriers taking off their charge on cotton moving to Memphis and the Southeast?

The Witness: No, and I think it should be; I think it is a nuisance charge, if you ask me what I think is reasonable.

Mr. Barron: This split as to LCL and carload, less than 40 bales and over 40 bales, do you think that would be effective?

The Witness: I am afraid of it; I just can't see how it would work out now.

Mr. Barron: If a man had fifty bales, what would stop him from taking out two bills of lading, for 25 bales each?

The Witness: Nothing; he could waive the 25½ cents a bale.

Mr. Barron: So your rule wouldn't mean anything, would it?

The Witness: I think it could be gotten around by those who want to get around it.

Mr. Barron: How many do you think wouldn't get around it, or wouldn't want to get around it?

The Witness: I wouldn't think that all of them would.

Mr. Thornton: The rates from Oklahoma to New Orleans are on a maximum reasonable basis, prescribed by the Commission.

The Witness: They are on a higher basis than to Galveston and Houston.

Mr. Thornton: And to the Southeast.

[fol. 377] The Witness: I said the Southeast was on a lower basis than Galveston, and if you are on a higher basis than Galveston, then, you must be on a higher basis.

Mr. Thornton: Your statement about the Southeast wouldn't apply to New Orleans, as to this charge?

The Witness: No, I think you should have some competitive arrangement, because that cotton, if not going to the Southeast, and not going to and consigned to coastwest or export, and is not going to the Southeast, I think you should be the same as Memphis.

Mr. Thornton: If going to the Southeast?

The Witness: Yes.

Mr. Thornton: And if not going to the Southeast, we should have the same privilege as if going to Lake Charles or the ports.

The Witness: Yes, if going to the Southeast, you should be related to Memphis.

(Witness excused.)

HALSEY MCGOVERN was sworn and testified as follows:

Direct examination.

By Mr. Donoho:

Q. Mr. McGovern, will you please state for the record your name, address and occupation?

A. My name is Halsey McGovern. I am assistant chief of the Transportation Division, Surplus Marketing Administration, U. S. Department of Agriculture, Washington, D. C.

[fol. 378] Q. Will you state briefly your experience?

A. I have been continuously in transportation and traffic work since October 1905, with carriers, as representative of shippers, and with the Federal Government. I have been in Interstate Commerce and State Commission practice work since 1920, having participated directly or indirectly in some several hundred cases.

Q. Are you prepared to make a statement with respect to the issues involved here in I. & S. Dockets 4981 and 4996?

A. Yes. I have prepared a few statements and some nine small exhibits which I should like to place into the record so that these may be before the Commission in considering a decision in these two cases.

Q. Will you please make a brief preliminary statement regarding the first of the exhibits you desire to present?

A. I should like to establish on the record the fact that exports of American cotton have fallen off to a material extent, inasmuch as our opinion is that this condition merits consideration in any proceeding which involves either the matter of adding to the cost of transportation or in a failure to go far enough in removing unnecessary transportation burdens.

(Exhibit No. 23, Witness McGovern, marked for identification.)

The Witness: With that in view, I should like to pass on to the first of my exhibits, which consists of three small pages

and shows by season for the crop years 1866-1867 through the current season, information as to the total United States [fol. 379] production, total United States exports, and the percentage ratio which total exports bear to total production for each of the seventy-five years, or seasons.

It will be noted from Page 3, of the exhibit, that the current season's exports will probably amount to approximately 1,063,000 bales, which is materially lower in number of bales than the exportations for all the seventy-five seasons covered by the exhibit. In point of fact, we must go back to the season of 1868-1869 to even closely approximate the small exportations of the current season. These exports of a little over a million bales are contrasted with the exports of 11,116,000 bales for the season of 1911-1912, and the 11,299,000 bales exported in the season of 1926-1927.

The present season's exports, representing as they do approximately only 8.3 per cent of the year's production, is by far the smallest percentage covering any of the seventy-five seasons. In fact, it will be noted that the percentage of exports in quite a few years have run in excess of 70 per cent.

We still lack a short period of having run through the present season and our figures of 1,063,000 bales shown as exported represents, in part, an estimate. The figure, however, does reflect actual exports for the first ten months, namely, actual exports up to and through May, 1941. Stated otherwise, our figure represents 975,500 bales increased to the same extent as was represented by the percentage which the last two months, on an average, represented of the [fol. 380] total exports during the past five seasons.

By Mr. Donoho:

Q. Is there any further comment with respect to that exhibit?

A. No.

Q. Will you proceed with your discussion of your next exhibit?

(Exhibit No. 24, Witness McGovern, marked for identification.)

The Witness: In this next exhibit, consisting of two small pages, we have shown information for the seasons commencing with August 1, 1920 down through our 1940-41

season as to (1) annual production; (2) the domestic mill consumption; (3) the carry-over at the end of the season; and (4) the percentage ratio which each year's domestic mill consumption bore to production.

On the second page of the exhibit we should like for you to insert the words "mill consumption" above the right hand column, since the figures on that page represent by months our mill consumption for the August, 1940 through May, 1941 ten-month period. It will be noted that actual mill consumption for those ten months amounted to a little over 7,914,000 bales which we have estimated will be the equivalent of approximately 9,600,000 bales as mill consumption for the full season. If this figure is realized or even approximate, it will represent by far the highest domestic consumption in the past twenty seasons or more, and it will likewise represent a bigger percentage of this current [fol. 381] season's production than held true in any of the past twenty seasons.

From the final figure in the third column of Page 1, of the exhibit, however, it will be noted that despite this encouraging increase in mill consumption, we may expect to have a carry-over larger than the carry-over of any season shown on the exhibit, with the exception of that for the season of 1938-1939.

Our thought in presenting this character of data was that we should like to have before the Commission the fact that, in addition to our cotton export markets having practically dried up, the producers and the cotton trade in general will finish the present season confronted with an enormous carry-over.

I would like to refer to the first exhibit, second page, just a moment, Exhibit 23, and make a brief statement for the record. I am sure everybody here is familiar with it, with respect to the figure for 1939 and 1940. There is a tremendous increase in the exports there, compared to the previous season, which reflects a subsidy program.

Mr. Bennett: Why not explain that?

The Witness: It was an underwriting by the Government, Mr. Bennett, with respect to exports, encouraging the exportation of cotton more than otherwise would have come about.

Mr. Bennett: The Government made up the difference in money, in other words?

[fol. 382] The Witness: Yes sir, the Government made up the difference in money, that is correct.

By Mr. Donoho:

Q. Have you completed your discussion of your Exhibit No. 24?

A. Yes, sir.

Q. Will you please now pass along to your next exhibit of a statistical nature and make such statement as will seem appropriate, for the record?

(Exhibit No. 25, Witness McGovern, marked for identification.)

The Witness: My next exhibit is a one-page exhibit concerning the growers' returns per acre from the raising of cotton, by season, for the years 1910-1911 through 1940-1941.

In the left hand column has been shown the United States average return per acre to the producers from their sale of lint or raw cotton, as well as from the cottonseed. The average for each season is shown in the second column of the exhibit under the heading of "Actual". From this exhibit it will be noted that growers' returns have ranged from a low of \$12.94 per acre in the season 1932-1933 up to an average of \$44.39 per acre for the season 1923-1924. The actual average return for the season 1939-1940 from actual sales by the growers was only \$25.79 per acre. The Department's estimate for the current season 1940-1941 stands at only \$28.38 per acre.

The low returns of only \$17.72, of only \$13.59, and only \$12.94 per acre for the first three seasons in the 1930's [fol. 383] resulted in authorization of government programs to supplement these returns, and this supplemental assistance, as added to growers' actual returns, are reflected in the next to the right hand column of the exhibit. Even with this supplemental assistance, it will be noted that the growers' returns per acre have run as low as \$29.19 per acre up to no higher than the prospective \$36.77 for the current season. Even should the average return per acre for the current season amount to as much as \$36.77, that total will be less than the direct returns during eight seasons since 1910.

Incidentally, these are the gross returns, and not the net return to the growers.

By Mr. Donoho:

Q. Will you pass on to your next exhibit, and show what is involved by the suspension in I. & S. Docket No. 4996?

A. I have prepared as my Exhibit No. 26, a large single sheet.

(Exhibit No. 26, Witness McGovern, marked for identification.)

The Witness: My Exhibit No. 26 shows the loading rules on cotton at Texas points, present and proposed reading of suspended items, Agent Ira D. Dodge's ICC No. 507; the proposed changes are underlined on this exhibit.

Mr. Belnap: I suggest that you might correct the spelling of Agent Dodge's name in the caption of your Exhibit No. 26; he might not appreciate the spelling of his name as "D-o-d-g-e-r's."

The Witness: Yes; and there are other corrections to be [fol. 384] made in connection with this exhibit, in the lower right hand column of this exhibit, the entire last two lines should be underscored. Four lines from the bottom in the right column, the sentence ending "and such loading charges,"—that should be supplemented by adding "immediately thereafter with "will not be allowed to follow shipment as advance charges." In other words, the last two sentences should read there precisely as the suspended item in 325-A.

There are approximately 3600 stations in Texas, and the proposed suspended rule in Dodge's tariff would propose to put in a different set of rules for only 38 out of the 3600 stations, or approximately 1.05 per cent.

(Exhibit No. 27, Witness McGovern, marked for identification.)

The Witness: I have prepared a similar exhibit as to I. & S. Docket 4981, which has been marked for identification as my Exhibit No. 27, being one large sheet, entitled "Loading rules on cotton at Oklahoma points, present and proposed reading of suspended items, Agent J. R. Peel's ICC Nos. 3307 and 3370; proposed changes are underlined."

My Exhibit 27 is prepared in the same way as the preceding exhibit, and I think that it is self-explanatory. I have no more comments to make on Exhibit No. 27.

By Mr. Donoho:

Q. Have you made any study of the effects of these proposed Frisco rules, that you have just finished discussing? [fol. 385] A. Yes sir.

(Exhibit No. 28, Witness McGovern, marked for identification.)

The Witness: I have prepared as my next exhibit, which has been numbered 28, a small one-page exhibit in which has been contrasted the rate treatment that would be accorded Frisco shippers on traffic destined to Dallas, as compared with cross-country shippers on the Southern Pacific shipping southward to Dallas. Similarly, there has been contrasted the rate treatment that would be accorded Frisco shippers at Texas points on shipments destined to Fort Worth and the treatment accorded M. K. and T. shippers at cross-country stations.

Before proceeding, I should mention that the word "From" in front of Dallas in the left-hand portion of the exhibit obviously should be changed to "To".

The 5½ cent per bale loading charge would be the equivalent of 1.04 cents per 100 pounds on a 530 pound bale and in the exhibit we have used that base in figuring the rates from Frisco stations to Dallas and Fort Worth. The first line of the exhibit, on that basis, shows that a shipper at Gunter, Texas, on the Frisco, for a 56 mile haul into Dallas, would pay a total of 16.04 cents per hundred; whereas a shipper at Howe, Texas on the Southern Pacific, for approximately the same distance, would pay only a total of 14 cents. Similarly, a shipper at Gunter, for a 79 mile haul into Fort Worth, would pay a total of 19.04 cents per hundred; whereas, a shipper at Sadler, Texas, cross-country [fol. 386] try on the Katy, would pay only 18 cents for a 78 mile haul.

These illustrations picture the situation that would prevail on southbound shipments concentrated at Dallas and Fort Worth, respectively, on port bound traffic.

Q. The last exhibit which you have just completed discussing deals with rate situations from Texas origins. Will you at this point take up and discuss the first of the exhibits you have prepared dealing with Oklahoma rates?

(Exhibit No. 29, Witness McGovern, marked for identification.)

The Witness: In this next one-page exhibit we deal with representative points on the Santa Fe in Oklahoma, such as Guthrie and Seward, et cetera. In the first column we have shown the distances through to Houston and the total charges through to Houston on 65,000 and 50,000 pound minima, none of which rates reflect a loading charge because quite properly, we think, it is not contemplated, under the suspended items, that loading charges would ride on such rates. In the next column, using Memphis, Tennessee as a destination as contrasted with Houston, Texas, we show the mileages from Guthrie, et cetera, which it will be noted rather closely approximate the distances to Houston, and we have shown the through rates from Guthrie, et cetera to Memphis on the 50,000 pound adjustment, which rates reflect the loading charge which rides with rates to Memphis at present, and under the suspended tariffs.

[fol. 387] In the final, or right hand third of the exhibit, we have shown the mileages from Guthrie, et cetera to Oklahoma City, Oklahoma, and we have shown the rates to Oklahoma City assessable under the suspended tariffs on traffic destined to Houston, as compared with the aggregate charges for the same amount of service from the same stations to Oklahoma City on Memphis-bound traffic.

Q. Do you have a somewhat similar exhibit dealing with M. K. & T. Railway stations in Oklahoma. Will you please pass on to a discussion of that exhibit?

(Exhibit No. 30, Witness McGovern, marked for identification.)

A. This next one-page exhibit is constructed along similar lines as followed in the preceding exhibit.

The core of this exhibit probably may be said to consist of the right hand third, which shows the distances from M. K. & T. Stations in the vicinity of Enfaula to McAlester, Oklahoma, the hauls ranging from 11 miles to 49 miles and the rate ranging from 10½ to 13 cents to McAlester on traffic destined to Houston, Texas; whereas for the same hauls to McAlester, the charges range from 11.54 cents per hundred pounds to 14.04 cents per hundred pounds on cotton destined Memphis and East.

Q. Will you please take up your next Oklahoma exhibit and proceed to explain it?

(Exhibit No. 31, Witness McGovern, marked for identification.)

[fol. 388] The Witness: This next exhibit is likewise a single sheet exhibit; and briefly stated, it deals with the fact that to Houston, Texas, as illustrative of Texas ports, different treatment is accorded Oklahoma origins on some lines than is accorded Oklahoma origins on other lines. From Rock Island and Frisco stations in Oklahoma, for instance, the so-called nuisance tax or loading charge is at present in effect and, under the suspended items, would continue in effect; whereas, under the suspended items Santa Fe stations in Oklahoma and M. K. & T. Stations in Oklahoma would be freed of the so-called nuisance tax or loading charge on traffic to Houston.

The action contemplated under the suspended tariffs which is reflected in the proposal to relieve Santa Fe and M. K. & T. Oklahoma stations of the loading charge to Houston, would place these stations and, of course, other Oklahoma stations, on the two lines, in the same position that presently prevails at the 3,600 or more stations in Texas. It is true, of course, that the same Santa Fe and M. K. & T. Oklahoma Territories, under the suspended publication, would be on a different basis, with respect to loading charges, than the same identical territories would be on Memphis-bound or East-bound business.

By Mr. Donoho:

Q. Does that conclude your exhibits, Mr. McGovern?

A. I think that is enough.

Mr. Donoho: Mr. Examiner, I offer in evidence Exhibits [fol. 389] 23 through 31, inclusive, and I ask that they be made a part of the record.

Examiner Archer: If there is no objection, they will be received in evidence.

(Exhibits Nos. 23 through 31, Witness McGovern, received in evidence.)

Mr. Donoho: I have no further questions of Mr. McGovern.

By Mr. Bee:

Q. As a traffic man, and as a representative of the Department of Agriculture of the United States Government,

do you feel that the carloading charges should be applicable on Oklahoma traffic, as on Texas traffic, where the destination is the same?

A. We think in the general interest of all producers and of all parties, that it should be the same.

Q. And the competition between the Texas and the Oklahoma producers is such that there is no justification for any such difference?

A. Yes sir, that is correct.

Mr. Bee: That is all.

Mr. Barron: Could you tell me your position, or the position of the Secretary of Agriculture, what his position or what your position is in connection with I. & S. Docket No. 4981?

The Witness: Briefly stated, we think that it is a movement in the right direction.

Mr. Barron: And as to I. & S. Docket No. 4996, you think that it is a movement in the wrong direction, I presume?

[fol. 390] The Witness: Yes sir.

Mr. Barron: That is all.

By Mr. Belnap:

Q. What have you to say about I. & S. Docket No. 4981, the Oklahoma case, insofar as it continues the imposition of a loading charge on cotton moving to domestic mills?

A. Quite frankly, we are hopeful, Mr. Belnap, in the Department, that the same treatment will eventually be accorded eastbound shipments.

Q. Do you think that it should be?

A. I think so.

Q. In any normal period, you recognize, do you not, that the movement to the Gulf is a competitive one with the movement to the domestic mills?

A. Yes sir.

Q. Insofar as the people are buying cotton?

A. Yes sir, and I think that the interest of the producer is tied in very keenly and very tightly with that competition.

Q. The man buying has to take the loading into consideration when buying, and when competing with a man that does not suffer that handicap and that disadvantage?

A. Yes sir. Expressed otherwise, if I may follow it through, he has got, everything else being equal, to pay as

much to the producer as the producer realizes out of the shipment, when there is no loading charge.

Q. Competition would get him into that position?
[fol. 391] A. Yes sir.

Q. So even if it is only one point, at 5 cents a bale, if it gets to a point where he can't beat that price, it is just that much loss of buying power to the producers?

A. Yes sir, and the grower suffers accordingly.

Mr. Belnap: That is all.

Examiner Archer: You are excused.

(Witness excused.)

Mr. Belnap: I will call Mr. Atkins.

J. E. ATKINS was sworn and testified as follows:

Direct examination.

By Mr. Belnap:

Q. Please state your name for the record?

A. J. E. Atkins.

Q. What business are you engaged in, Mr. Atkins?

A. Cotton business.

Q. Under what name?

A. J. E. Atkins & Company.

Q. That is a trade name?

A. Yes sir.

Q. Where is your main office located?

A. Fort Smith, Arkansas.

Q. What is the nature of your cotton business?

A. Well, most of the cotton we buy is for L. T. Barringer & Company.

[fol. 392] Q. In other words, you buy that cotton for L. T. Barringer & Company on a commission.

A. Yes sir.

Q. Do you also do a regular cotton merchant's business?

A. Yes sir.

Q. And buy and sell for your own account?

A. Yes sir.

Q. How much business did you do last year?

A. We handled 35,000 bales.

Q. How much for your own account?

A. I would say eight or nine thousand bales.

Q. And the balance of it was handled on commission for L. T. Barringer & Company?

A. Yes sir.

Q. In what territory do you buy?

A. In the Fort Smith and Muskogee territories.

Q. Do you buy at origins along the line of the M. K. & T. Railroad, and along the line of the Santa Fe, which roads are involved in this proceeding?

A. Yes sir, we do.

Q. Just how much of those particular lines do you cover in your buying?

A. I would say territory covering a radius of 100 miles, surrounding each place.

Q. And so far as Oklahoma is concerned, that would be [fol. 393] a 100 mile radius of Muskogee, Oklahoma?

A. Yes sir.

Q. Where do you buy your cotton, as to its location when you buy it?

A. Usually at the gins or from merchants.

Q. What do you mean by "Or from merchants"?

A. Sometimes the merchants buy it from the producer, and we buy it from them.

Q. How much of your cotton last year was purchased at gins?

A. I would say about 24,000 bales.

Q. And the balance of it was purchased at compresses?

A. No sir, mostly at gins.

Q. That is, 24,000 bales at gins,—now, where was the balance of it purchased?

A. At compresses.

Q. In compresses?

A. Yes sir.

Q. When you buy cotton at a gin, you are competing with other brokers and other cotton merchants, are you not?

A. Yes sir.

Q. Is the competition keen?

A. Very keen.

Q. In normal periods, is much of that competition encountered from those who purchase with a view to shipping to the Gulf ports?

A. Yes sir, especially in the last season, in the last two [fol. 394] or three months.

Q. Do you make purchases at gins where the shipper must load the cotton, or call upon the railroad to do it for him?

A. In most cases, the ginner doesn't load it; I will just guess—it is a rank guess,—75 per cent.

Q. The places where you are purchasing?

A. Yes sir.

Q. In that event, who does load it?

A. The railroad loads it.

Q. And under the present arrangements, the railroad assesses a charge for that loading service of $5\frac{1}{2}$ cents a bale, is that correct?

A. Yes sir.

Q. And do you have to take that loading charge into consideration when you are purchasing cotton at a gin?

A. Yes sir, we figure mostly on a landed price, especially with Barringer, we figure with Fort Smith, it will cost us 92 cents to land the cotton at the mill.

Q. And would that be the same for Muskogee?

A. It would be one point higher.

Q. Let's deal with Oklahoma, then.

A. At Muskogee, they have a one point higher compression rate, so we figure one point higher in our landing charge, and in most cases, we figure one point; at Fort Smith, it is 91 points to land the cotton at the mill points [fol. 395] today, and we have to pay that one point and take it into consideration, that one point difference; we figure one point instead of $5\frac{1}{2}$ cents a bale, and we just figure it a total of 92.

Q. You take that into consideration in landing the cotton where?

A. At Kannapolis, North Carolina.

Q. You have mentioned a point several times,—what is a point equivalent to?

A. Five cents a bale.

Q. Do you, in this cotton that you purchase at compresses, include some cotton which is moved in there by rail?

A. Yes sir, we do.

Q. From whom do you buy that cotton?

A. That might be from ginner or from merchants.

Q. How do you buy that cotton?

A. We usually buy it, if it is rail cotton, we buy it on bill of lading, we usually handle it by draft, and if it is what

is termed street cotton or truck cotton, we buy that on a warehouse receipt.

Q. Do you sometimes buy rail cotton on a warehouse receipt?

A. Yes.

Q. When you buy rail cotton on a bill of lading, do you know at the time of your purchase whether it has been loaded by the carrier or otherwise?

A. Yes sir.

Q. How do you know that?

[fol. 396] A. The bill of lading carries the notation by whom it is loaded, and the expense bill will carry that notation too.

Q. And you ascertain what the facts are from those documents, before you set the price on the cotton?

A. Yes, sir, that is correct.

Q. And when the expense bill or the bill of lading shows that the cotton was loaded by the carrier, do you take that cost into consideration in arriving at your landed basis?

A. Yes sir, one point.

Examiner Archer: What is one point?

The Witness: That means five cents a bale.

By Mr. Belnap:

Q. It is equivalent almost to the loading charge?

A. Yes sir, it lacks a half a cent a bale.

Q. Tell us how you would be affected as to your own account or in buying on commission for L. T. Barringer & Company, if the cotton which you purchased is subject to the loading charge, whereas, the cotton that is purchased by somebody desiring to move it to the Gulf ports is free from a loading charge?

A. I feel that it would be a 5 cents a bale advantage to them. If I buy for L. T. Barringer, I figure in one more point to land.

Q. In other words, your price would be forced to be five cents a bale less?

A. Yes, sir.

[fol. 397] Q. Is that right?

A. Yes, sir.

Q. And is the competition sufficiently keen in the cotton business that the difference of 5 cents a bale will make or lose a sale?

A. Yes, sir. I will just give you an example. At Fort Smith, we have a compression rate of 12 points, and at Muskogee they have a rate of 13 points, and we bring all of the cotton in that we can into Fort Smith, from the lines of the Katy and the Frisco and the Santa Fe, we bring that cotton into Fort Smith in order to save that one point. Now, the competition in the cotton business is just that keen.

Q. In other words, a difference of one point will permit you to buy the cotton, or the addition of one point might not permit you to buy it?

A. Yes, sir.

Q. In other words, the elimination of this one point will permit you to handle this cotton, whereas, if you had to add the point, you couldn't handle it?

A. Yes, sir, that is correct. We think so much of that one point, that we have all the cotton that we can ship to the Federal Compress at Fort Smith, instead of sending it to the Traders at Muskogee.

Mr. Belnap: That is all.

Examiner Archer: Any questions?

[fol. 398] Cross-examination.

By Mr. Barron:

Q. Then, your only purpose in testifying here today is because the rule here under suspension does not include the absorption of the loading charges on traffic going east, is that right?

A. That is right?

Q. You haven't given any consideration to whether or not the rate to the southeast would reflect more than the one point that you think that you would be disadvantaged by the loading charge, have you?

A. I couldn't answer that. I just figure it saves me one point, and I am interested in that.

Q. That one point means a lot to you?

A. Yes, sir, the one point means a lot to me.

Mr. Bennett: Taking the experience of the past two seasons into consideration, you think that it would affect you?

The Witness: Yes, that point means so much to us in buying that we pass up Muskogee and bring it to Fort Smith.

Mr. Bennett: Isn't it a fact that the cotton merchants take the actual published rate into consideration, and not the level of the rate?

The Witness: I think that is right.

Examiner Archer: Any one else?

(No response.)

Examiner Archer: You are excused.

[fol. 399] (Witness excused.)

ALONZO BENNETT was sworn, and testified as follows:

Direct examination:

The Witness: My name is Alonzo Bennett—

Mr. Barron: We will admit his traffic qualifications.

The Witness: My name is Alonzo Bennett; I am appearing here as Chairman of the Traffic and Transportation Committee of the Mississippi Valley Interior Cotton Compress & Cotton Warehouse Association, whose membership consists of both warehouses without compressing machines and warehouses with compressing machines located in the cotton producing states bordering the Mississippi River.

I am also Vice-President of the Federal Compress and Warehouse Company with general offices at Memphis, Tennessee, and I am also appearing for them.

This company operates about 88 or 90 plants in the producing states bordering on the Mississippi River. All of these plants are warehouses with compress machines except 6 or 7.

The warehouses and compresses in this section loaded something like 6,000,000 bales during the 40-41 season, and the Federal Compress & Warehouse Company's shipments are around approximately 4,000,000 bales.

Without going into detail, Mr. Examiner, as to what part the compresses perform in connection with transportation, [fol. 400] and in order to show it in the record, I will refer you to the Commission's decisions in Dockets 14940, 17000 part 3, 26235 and I. & S. Docket No. 4159, and you will find in these decisions that the Commission has held that the compresses are an integral part of the transportation system, and that they do have an interest in proceedings of this character.

Our position is, first, that we are opposed to the suspended tariffs becoming effective.

Examiner Archer: Which ones, those proposed in L. & S. Docket 4981?

The Witness: 4981, because we feel that if they should be permitted to become effective that it would be discriminatory against the Oklahoma cotton moving to Little Rock, Memphis and other warehouse points in that section for concentration and reshipment to the southeastern mill points.

We have been fighting for some twenty years to place Memphis on a parity with the Texas ports, and have only about reached that position within the last few years, and we think that this loading charge will be a step in the wrong direction unless it is eliminated on cotton moving eastbound to Little Rock, Memphis, and other warehousing points.

It has been stated hereby Mr. Allen that the carriers would load the cotton at the non-compress points free of charge for the shippers when moving under the carload rates. We would oppose this to the limit of our ability because we [fol. 401] feel that that would be discriminatory to the compresses and warehouses who really give the railroads the heavy loads in furnishing the facilities to them.

In November, 1939, the carriers, and I believe the carriers sitting around this table, or at least part of them, got into an argument about this loading charge, someone to take it off and someone to keep it on, and they had to bring in Commissioner Johnson.

Mr. Barron: Now, I object to any statement like that, Mr. Examiner. It is certainly not material here. It is hearsay, it is incompetent.

Examiner Archer: The objection is overruled.

The Witness: And on November 14th—

Examiner Archer: Now, I don't know about the Johnson business—you will read any telegram, I suppose?

The Witness: Yes, sir, and on November 14, 1939, I sent a telegram to Mr. H. R. Wilson, General Freight Agent of the Missouri Pacific Lines, as follows:

“Understand hearing to be held St. Louis tomorrow before Commissioner Johnson, regarding controversy between carriers relative proposition railroads loading cotton moving on carload rates for shipper without charge stop

under compress agreements we are furnishing railroads with depot facilities, and while we do not advocate charging the carriers for loading cotton moving under earload rates [fol. 402] nevertheless if railroads load cotton not only in compress towns, but non-compress towns for shippers it creates rank discrimination against our company, and under the circumstances if you do load cotton moving under earload rates we will expect you to either load similar cotton at our plants or make us an allowance commensurate with your costs for performing same service stop surely you will not permit this rank discrimination to become effective by publication joint Wilson Norden Spann Roberts Mills".

As the latter portion of the telegram indicates, it was jointly sent to Mr. Wilson of the Missouri Pacific; Mr. Norden of the Frisco; Mr. Spann, of the Rock Island, Mr. Roberts of the Cotton Belt, and Mr. Mills of the Kansas City Southern.

East of the Mississippi River, in the Mississippi Valley, what we call the Mississippi Valley Territory, earload rates on cotton moving from the states of Mississippi and Tennessee, there is a rule in that tariff prohibiting the shippers from using railroad facilities for the loading of cotton moving under earload rates. We think that the same rule should apply to the carriers west of the river.

The carriers east of the Mississippi River in the section that I am talking about published a rule in what we understood was an effort to comply with the rules carried in the consolidated freight classification tariff No. 14.

I believe that is all.

[fol. 403] By Mr. Bee:

Q. Do I understand you to say that you want a parity of the rates from the western part of the country to the Texas ports and to the southeast?

A. No, I didn't say that, but we want to be treated in the same manner, on the same basis in our section as the Texas ports are treated.

Q. Haven't you been treated so in the last two years that you are receiving much more cotton now than the Texas ports are receiving?

A. The reason we are receiving more cotton now is because of the lack of exports, and not because of any great Christmas gift that has been given to us by anybody.

Q. You are not seeking a parity of rates from Oklahoma, from Oklahoma to the ports in the southeast in this proceeding, are you?

A. I am saying in this proceeding that the loading charge is discriminatory and would affect any cotton moving to our section vs. cotton moving to the Texas ports.

Q. Well, that is because you furnished the facilities for the railroads in your territory, isn't it?

A. Not particularly that; like everyone else we have an interest in the matter because we furnish storage facilities also for the merchant.

Q. If you have to take your cotton to the railroad platforms and deliver it the same as any other shipper, there would be no discrimination against you, would there?

[fol. 404]. A. There would be if the railroad loaded the cotton moving under a carload rate.

Q. If they loaded it for you at the depot platform the same as they do for anybody else, would there be any discrimination against you?

A. No, but there would be a lot of charges added to it where it couldn't be paid, and that would make it more discriminatory.

Q. In other words, you prefer to load it at your facilities than to take it over to the railroad's facilities?

A. Yes, sir, I think so; that has been the history of the compress business in this territory since 1878; the compress business began in 1878 or just along about that time.

Examiner Archer: Is that all?

By Mr. Barron:

Q. Do you make a charge to the shipper for loading the cotton, Mr. Bennett?

A. Yes.

Q. If the carriers paid you 5 cents, would you cut that out of the shippers charge?

A. I think we would.

Q. You think so?

A. In fact I know we would. If you will fix rates so that you are going to load carload cotton for nothing on a railroad platform, and that is equalized with us, compared with that you would have to do it by sending a crew to load our cotton or by paying us our charge, and we would be forced [fol. 405] to reduce our charge to get the cotton to the compress.

Q. Do you mean by "equalize" that you would be willing to have your rates from Oklahoma through Memphis to the southeast on the same basis, mile for mile, as they are to the Gulf ports?

A. No, that is not my answer to your question. I understood your question to be the compress charges.

Q. But you brought in the word "equalize", and I am going further and ask you if you would be willing to have your rates equalized with the rates applicable from Oklahoma to the Texas ports, so as to effect a relative adjustment from Oklahoma to the southeast through Memphis as from Oklahoma to the Texas Gulf ports?

A. I don't think our rates are out of line.

Q. You know that you have a lower basis of rates, mile for mile, than from Texas, don't you?

A. No, sir.

Q. Have you checked them?

A. I didn't participate in that, but I don't agree with you.

Q. Have you made any check on that subject?

A. I haven't made any detailed study of it.

Q. I understand that you have no objection to the rules suspended in I & S Docket No. 4981 if they are projected over to Memphis, is that right?

A. That is right, but we go farther, if it is going to have the effect of the railroads loading free of charge over [fol. 406] their platforms cotton delivered to shippers moving under carload rates, then we would, of course, have to ask those tariffs to be suspended and try them on the merits.

Q. Now, what is your position on I & S Docket No. 4996?

A. I haven't testified about anything in Texas, but I will say this: Following behind what Mr. Allen had to say—that the railroads would load the carload cotton in Texas at non-compress points free of charge and that makes it become discriminatory against the compresses, then I would say that the charge should be put on.

Q. Then you are in favor of I & S Docket No. 4996?

A. Under the statements made by me, under those conditions.

Mr. Barron: That is all.

Examiner Archer: Any other questions?

(No response.)

Examiner Archer: Apparently not, and you are excused.

(Witness excused.)

Examiner Archer: Anyone else to be heard at this time?

Mr. Barron: I want to put on some rebuttal testimony at this time.

J. G. JAY was recalled in rebuttal, and testified further as follows:

Direct examination.

By Mr. Barron:

Q. Mr. Jay, you have been sworn and testified in this proceeding earlier today?

[fol. 407] A. Yes, sir.

Q. You were asked this morning about certain figures as to compress points and gin points?

A. Yes, sir.

Q. Have you compiled that information?

A. Yes, sir.

Q. Will you please read it into the record at this time, Mr. Jay?

A. In the counties served by the Santa Fe lines in Oklahoma there are 79 gins local to the Santa Fe Railway; there are 47 gins located at competitive stations, served both by the Santa Fe and by other lines.

There are 127 gins located in those counties at stations not served by the Santa Fe.

There are 56 inland gins located at non-railroad stations in the same counties.

Of the above 47 gins located at competitive stations, 26 are located at compress stations served by the Santa Fe and other lines; and of the inland gins 15 are located adjacent to compress stations.

These figures were obtained from the cotton department of the Corporation Commission of Oklahoma and represented the gins which were listed as active at the beginning of the past cotton season. There are approximately 50 gins in Oklahoma which are carried as dormant gins,—that are [fol. 408] not operating but which do operate when production and so forth justifies.

In making a comparison of the gin figures in the counties served by the Santa Fe, the total at local Santa Fe stations and at competitive stations served by the Santa Fe is 126

compared with 127 gins located at rail stations, in those counties which we do not serve.

Q. Doe that complete your statement?

A. Yes, sir.

Examiner Archer: Any questions of this witness?

Mr. Belnap: No, sir.

Examiner Archer: You are excused.

(Witness excused.)

Mr. Barron: I will now call Mr. Veale.

W. L. VEALE was recalled in rebuttal, and testified further as follows:

Direct examination.

By Mr. Barron:

Q. You have been sworn and heretofore testified in these proceedings today, is that correct, Mr. Veale?

A. Yes, sir.

Q. Have you some exhibits that you wish to offer in rebuttal, Mr. Veale?

A. I do.

Q. Were such exhibits prepared by you or under your direction?

A. Yes, sir.

Q. Are these exhibits true and correct to the best of your knowledge and belief?

[fol. 409] A. Yes, sir, so far as I know.

Q. Will you please proceed with an explanation of your exhibits so that they may become a part of this record, and where the exhibit is self-explanatory please do not go into too much detail.

A. The first exhibit will be numbered 32.

(Exhibit No. 32, Witness Veale, marked for identification.)

The Witness: And this exhibit is a map disclosing the origin points, the origin groups in connection with the rates to southern territory and the Mississippi River crossings. The map is self-explanatory, it seems to me, and is intro-

duced for the purpose of clarifying the location of points which will be listed upon following exhibits.

(Exhibit No. 33, Witness Veale, marked for identification.)

The Witness: My next exhibit, No. 33, will be one styled "Statement of distances and rates to Houston Texas from representative origins in Oklahoma", and it consists of one page.

This exhibit is introduced to disclose representative origin points in each of the rate groups in Oklahoma; these origin points are compress points, and are stated to be representative Oklahoma origins in each of the rate groups applying to southern territory. The exhibit shows the short line distance and the average short line distance from the points listed, the distances to Houston, Texas; it also shows the actual rates to Houston from each origin and the average rate from the origins in a particular rate group,

[fol. 410] (Exhibit No. 34, Witness Veale, marked for identification.)

The Witness: My next exhibit, No. 34, consisting of seven pages, is a statement entitled "Statement of short line distances from compress stations in Oklahoma to representative textile mill stations in Southern Freight Association territory".

This exhibit is submitted as disclosing the distances from these same representative Oklahoma origins to representative mill points, and the routes over which the distances were made.

(Exhibit No. 35, Witness Veale, marked for identification.)

The Witness: My next exhibit will be No. 35, which is an exhibit with a map attached to it, and the exhibit is entitled "Comparative statement of distances, rates and earnings to Houston and representative destinations in southern territory", and so forth,—in other words it is a statement, comparative statement of distances, rates and earnings, from Muskogee, Oklahoma to Houston. The point of Muskogee was chosen as being the only compress point in group 5550-B and is, due to its location, representative of the origins in that group, it being remembered that a compress point is representative of country origins, because the cotton

usually moves within a short distance, around 50 miles at the most. The exhibit makes a comparison with the rates applying to Houston and those applying to representative mill points in southern territory which are set forth on the map encircled in blue. The destinations are considered truly representative because they are spotted at various [fol. 411] positions in the group and are representative of the varying distances involved to each group.

I would like to call particular attention to this exhibit and the same on the three following exhibits, that the earnings to southern territory in mills per ton mile compare very favorably with those to Houston in connection with column one, or 25,000 minimum weight, except when you get into the southern area in the vicinity of Montgomery, Alabama, and from there on over to the coast, the earnings in mills per ton mile drop under the earnings to Houston considerably, indicating a much lower level of rates to the large consuming portion of southern territory.

In that portion of the exhibit devoted to earnings in cents per car mile, attention is directed to the fact that in comparing the 50,000 pound rate to Houston with the 50,000 pound rate to southern mill points, which is the column three set of rates, the earnings in cents per car mile compare favorably until you reach Alabama, and from there on the earnings begin to drop under the Houston level considerably, and are considerably lower in connection with 50,000 pound consignments when compared with the Houston 65,000 pound consignments.

That is also true in the mills per ton mile, the earning in connection with 50,000 pounds, the mills per ton mile are considerably lower than the 65,000 pound rate to Houston.

Mr. Belnap: That is for the longer distances?

[fol. 412] The Witness: Lower for the longer distances, and about the same for the shorter hauls in southern territory.

By Mr. Barron:

Q. On page four of your exhibit No. 35, do you want to insert there under the reference (1) where the blank is left, the figure "33"?

A. Yes, sir.

Q. And in the note (2) the figure "34" in the blank?

A. Yes, sir. Those refer to the two mileage exhibits which are my exhibits 33 and 34 in this proceeding.

Q. Then on page four of your exhibit No. 35, the first reference is to exhibit 33 and the second reference is to exhibit 34, is that correct?

A. Yes, sir.

Q. All right, proceed.

(Exhibit No. 36, Witness Veale, marked for identification.)

The Witness: The next exhibit will deal with the Arkansas group, No. 6550, and it will deal with Durant, Hugo, and McAlester, Oklahoma, being the same kind of exhibit as the previous exhibit.

On page seven of my exhibit No. 36, two blanks are left in which should be inserted 33 and 34, respectively, as the notes there refer to my exhibits 33 and 34.

I won't take up the time to explain the figures in this exhibit, as I think it is self-explanatory.

(Exhibit No. 37, Witness Veale, marked for identification.)

[fol. 413] The Witness: My next exhibit, No. 37, will deal with Ardmore, in a similar fashion as the previous exhibits. Ardmore is the only compress point in that group in Oklahoma, being origin group No. 6650; that group extends on down into Texas, however, and there are Texas origins, but this comparison was restricted to Oklahoma because the Texas origins were not involved in this case. This exhibit shows substantially the same figures as the others.

Mr. Barron:

On page four of your exhibit No. 37, the two blank spaces left there should be filled in with the numbers 33 and 34 respectively, is that correct?

(Exhibit No. 38, Witness Veale, marked for identification.)

The Witness: My next exhibit, No. 38, deals with the same situations relative to Anadarko, Chickasha, Clanton, Elk City, Hobart, Oklahoma City, Pauls Valley, and Waurika; those compress points are located in group No. 6660.

In considering this exhibit, we would like for you to consider the extreme distances involved in excess of those to Houston.

On page 7 of this exhibit the blanks which have been left should be filled in with the figures 33 and 34, as it refers to my exhibits 33 and 34.

(Exhibit No. 39, Witness Veale, marked for identification.)

The Witness: Now, my next exhibit, No. 39, is devoted [fol. 414] to the rates from Texas to the southeastern territory. This exhibit consists of five pages, having three pages of maps attached, and it depicts the rates from Western Texas which are in a comparable position as regards Houston as are the origins in Oklahoma. We have shown here on these maps the necessity of holding the Lake Charles Louisiana rates as minima into southern territory. We believe that is about the best way we can show that from Texas and if the rates from Oklahoma operated from Lake Charles to southern territory, this same condition would obtain from Oklahoma. Without doubt, the rates from Texas are extremely lower as a basic proposition than to Texas ports. I should direct your attention to one of these maps, that being the last attached, which deals with origin group 8770-B. The origins in origin group 8770-B are those shown on page one of this exhibit, being Brownfield, Lamesa, Levelland, Littlefield, Ralls, and Tahoka. It was necessary to observe the Lake Charles, Louisiana, rates as minima as far east as Atlanta and Albany, Georgia, Knoxville, Tennessee, and all of the territory in the southeast lying between those points, roughly, and the Mississippi River. That also included Paducah, Kentucky, and Nashville, Tennessee. So, when you have to observe Lake Charles, Louisiana rates as a minimum to Atlanta, Georgia, certainly there must be some doubt as to the fact that the rates to southern territory are upon a higher level than the Texas Gulf ports.

I would like to make a statement in connection with one made by Mr. Thaman regarding the minimum weights [fol. 415] and the difficulty in loading. In Texas, we have had this free loading rule operating now since October 15, 1939, and we have never yet experienced any difficulty in loading any shipment tendered to us. We have never had a 65,000 pound shipment tendered to us for loading; we have never had one of 50,000 pounds; we have never had one of 35,000 pounds. We have had shipments of 25 bales,

of 46 bales, tendered to us, and we loaded them. Actual experience on the part of the Texas lines, the Panhandle & Santa Fe Railroad in Texas, and the G. C. & S. F. would indicate that this alleged trouble about minimum weight and loading is a bug-a-boo in somebody's mind, because we haven't any such experience ourselves.

As to changing the character of the carload adjustment, Mr. Thaman remarked that this would tend to change the character of the carload adjustment. The rule has been in effect in Texas since October, 1939, and it hasn't changed the character of the adjustment in Texas. We have an any quantity character of carload rates, anyway, and the fact that we load the shipment does not change the character of it a bit.

By Mr. Barron:

Q. I show you exhibit No. 20 of Witness Lallinger, and I ask you to state for the record if the bales that he has shown under the fifth item as shown on his exhibit No. 20 would actually be affected by the suspended rule in Arkansas and Oklahoma?

A. If the Frisco Railroad in Oklahoma instituted a loading of cotton on their lines under the same method that the [fol. 416] Santa Fe Lines in Texas have performed the loading, the Frisco Railroad would not load any bale of cotton twice; it would not load all of its cotton once. If he wants to throw his money away, of course—

Mr. Belknap: Let's stick to the facts.

Mr. Barron: Just a minute.

Mr. Belknap: The witness is arguing now and talking of what has gone in before.

By Mr. Barron:

Q. Under the Santa Fe rule, would the rule apply to the fifth item as shown on exhibit No. 20 of Witness Lallinger?

A. It would not.

Mr. Barron: That is all. I offer exhibit 32 through 39 and ask that same be received in evidence.

Examiner Archer: If there is no objection, those exhibits will be received in evidence.

(Exhibits 32 through 39 received in evidence, Witness Veale.)

Cross-examination.

By Mr. Baumann:

Q. In making that answer, are you acquainted with conditions in Arkansas and Oklahoma?

A. Not in Arkansas.

Q. You heard Mr. Lallinger's testimony that rules would have to be made to suit local conditions, did you not?

A. I heard Mr. Lallinger's testimony; I heard him testify he would make it apply to gin points even though [fol. 417] served by trackage. We have no gin points served by trackage. We have warehouses served by trackage which do not have compressing machines. We have been approached to perform the loading of those warehouses and compresses and we have given all of those people the same answer—that is if you are a shipper and you will bring your cotton to our depot or cotton platform that we would load every bale of it for you just like we do for Farmer Jones.

Q. Do you have a bond or contract arrangement?

A. We do not enter into any alliance with any compress at all.

Q. It is not the trade practice in that area?

A. There may be some trade contracts in Texas, but it is my understanding that in general we don't tie ourselves to them.

Mr. Bennett: You are not trying to leave in the mind of the Commission or anybody else that you can load any car to capacity without any difficulty, are you?

The Witness: I am not trying to leave anything in the mind of the Commission; what I am trying to say to them is that it is the experience of our company that we have never been requested to perform this heavy loading that has been referred to.

Mr. Bennett: But that is not my question. You were asking Mr. Thaman, about this loading, but my question was as to the fact of whether or not anybody could load heavy loads under the minimum with ease. For instance, can you get up a country or a countryman get up a crew

and load a carload of cotton as easy as the compress, who [fol. 418] is fairly experienced in doing it?

The Witness: In several instances, it has been necessary for us to send transportation inspectors to the compress plant to show them how to load the cotton.

Mr. Bennett: But that doesn't answer my question.

The Witness: We can load the cotton; if a man will give us 65,000 of round bale cotton, we will get it in a box car.

Mr. Bennett: How about standard compress cotton?

The Witness: I doubt if you could do that.

Mr. Bennett: We haven't loaded but about three or four million bales of it.

The Witness: We can load it if the compress can load it.

Mr. Bennett: Well, that's all.

Examiner Archer: Any other questions?

(No response.)

Examiner Archer: Any redirect?

Mr. Barron: That is all.

Examiner Archer: You are excused.

(Witness excused.)

Mr. Barron: That is all I have.

Examiner Archer: Anybody else that wishes to be heard today?

(No response.)

Examiner Archer: Apparently not.

Mr. Belnap: May we have a proposed report in the case?

[fol. 419] Examiner Archer: That will depend upon the railroads, the respondents, whether they are willing to postpone the tariff.

Mr. Bee: We will object unless it is very quickly; we are suffering quite a bit, and we would like to have these rates in.

Mr. Baumann: I believe in view of the general principle involved we would like to have a proposed report.

Examiner Archer: You mean for I & S 4996, and you would be willing to postpone those tariffs?

Mr. Baumann: Yes, sir.

Mr. Barron: We are anxious to get these rules in effect by the next shipping season, which starts in September, and for that reason I must object to a proposed report.

Examiner Archer: All right, then, there will be no proposed report.

Mr. Barron: In fact, I am in such a hurry to get this matter decided I would be willing to submit the case on the record.

Mr. Baumann: I think I would like to brief the case.

Examiner Archer: Off the record.

(Discussion off the record.)

Examiner Archer: Do you want to file briefs?

Mr. Belnap: Yes.

Mr. Baumann: Yes, sir.

Mr. Barron: Will you make briefs not earlier than September first, if that is the case. I want to really submit it on the record.

[fol. 420] Examiner Archer: Off the record.

(Discussion off the record.)

Examiner Archer: Briefs will be due on September 9, 1941.

Mr. Belnap: To be on the safe side, Mr. Examiner, I will say that I would like to orally argue the case.

Examiner Archer: You are requesting oral argument now?

Mr. Belnap: Yes, sir.

Examiner Archer: The hearing is closed.

(Whereupon at 7:00 P. M., Saturday July 19, 1941, the hearing was closed.)

AFFIDAVIT.

STATE OF TENNESSEE. }
 COUNTY OF SHELBY. } ss:

L. T. Barringer being first duly sworn on oath deposes and says:

(1) That he is the President of L. T. Barringer and Company, hereinafter referred to as the Company, a corporation organized and existing under the laws of the State of Tennessee with its principal office and place of business at Memphis, Tenn.; that the Company is and for many years has been engaged in the business of buying, selling, and shipping cotton, and in the course of that business it makes, and has made, purchases of cotton at various cotton gins and concentrating points in the State of Oklahoma located at stations on the lines of railroads which were respondents in a proceeding before the Interstate Commerce Commission known as *Investigation and Suspension Docket No. 4981, Loading Cotton In Oklahoma*; that the Company resells the cotton so purchased by it to domestic mills located in the States of Georgia, Alabama, South Carolina, and North Carolina, said resales being made on the basis of prices delivered at destinations; that the Company in so purchasing cotton in Oklahoma and in so selling cotton to manufacturers pays, or has paid, for its account, all freight rates and charges legally applicable thereto under tariffs filed with the Interstate Commerce Commission, including the rates named for line-haul transportation from the origins from whence the cotton is shipped to the destinations to which it is consigned and, in addition, the loading charges on said cotton when loaded by the railroads:

(2) That the Company purchases said cotton in Oklahoma in competition with other cotton merchants,

including cotton merchants who ship the cotton purchased by them to Beaumont, Corpus Christi, Galveston, Houston, Orange, Port Arthur, and Texas City, Tex., and Lake Charles, La., (said destinations being hereinafter referred to as the Texas gulf ports); and said competitive merchants, in purchasing said cotton and in shipping it to the Texas gulf ports, pay, or have paid, for their account, all freight rates and charges legally applicable thereto under tariffs filed with the Interstate Commerce Commission, including the rates named for line-haul transportation from the origins from whence the cotton is shipped to the destinations to which it is consigned and, in addition, the loading charges, if any, which may be due on said cotton;

(3) That when the Company purchases cotton as aforesaid at cotton gins in the State of Oklahoma, it causes said cotton to be shipped via railroad in less than carload quantities to cotton concentrating points in the State of Oklahoma where said cotton is compressed and then assembled with other cotton into carload lots; that after such compression and concentration the Company causes said cotton to be reshipped in a carload lot to a domestic mill to whom the Company has sold said cotton in the States of Georgia, North Carolina, Alabama, or South Carolina; that in making shipments as just described the Company pays on the inbound move from gin origin to concentrating point the inbound transit or float-in rates therefrom and to as named in Agent J. R. Peel's I. C. C. 3307, supplements thereto and reissues thereof; that in making said shipments from said concentrating points to ultimate destinations the Company pays to the railroads performing the transportation, or has paid to the railroads for its account, the line-haul rates on carload quantities as named from and to said points in Agent J. R.

Peel's L. C. C. 3370, supplements thereto and reissues thereof; that in addition to paying said line-haul rates, the Company also pays to the railroads, or has paid to the railroads for its account, all tariff charges due for accessorial, transit and terminal services, including the tariff charge for loading when such loading is performed by the railroads at the point where the cotton first originated;

(4) That after shipments are made and rates paid, as described in paragraph 3 hereof, the Company demands and receives a transit settlement thereon as provided by the railroad tariffs, viz., the Company files with the railroads performing the transportation services its concentration claim and has refunded to it the difference between the aggregate of the line-haul charges as paid to and from the concentration point and the through charges as determined on the basis of the line-haul rate from first origin to final destination; that the railroads do not refund to the Company in connection with such concentration claim the charges paid by it for accessorial, transit, and terminal services, including the charge for the service of loading the cotton when performed by the railroads;

(5) That when the Company purchases cotton as aforesaid at concentrating points in the State of Oklahoma and said cotton has been shipped to said concentrating point in a less than carload quantity via railroad, the Company also purchases the inbound freight bills on said cotton for an amount equal to the inbound line-haul charges paid on said cotton as shown by said freight bills; that said cotton is then handled by the Company in the manner described in paragraph 3 hereof and the line-haul rates thereon are then settled in the manner described in paragraph 4 hereof; that

the in-bound billing on said cotton has indicated thereon whether it was loaded by the shipper or whether it was loaded by the carrier; that in cases when said in-bound billing shows that said cotton was loaded by the carrier, the tariff charge for said loading service is collected from the Company at the time the railroads settle the concentrating or transit claim filed by the Company thereon; that said collection is accomplished by the railroads deducting the amount of said loading charge from the refund which would otherwise be due to the Company in the transit settlement;

(6) That J. E. Atkins, who testified as a witness for the Company before the Commission at the hearing in *Investigation and Suspension Docket No. 4981*, is employed by the Company on commission as its agent to purchase cotton in the State of Oklahoma; that the cotton so purchased by J. E. Atkins is purchased and shipped in the name of the Company and the Company pays the legally applicable freight rates and charges on said cotton in the manner above described;

(7) That the foregoing statement of facts relates to cotton as purchased and shipped by the Company and to the freight charges paid thereon in the period prior to April 21, 1942, the date on which the order of the Commission in the case known as *Investigation and Suspension Docket No. 4981, Loading Cotton in Oklahoma*, became effective.

(8) That since April 21, 1942, the tariffs of said respondents in said proceeding, as filed with the Interstate Commerce Commission, have provided that respondents will load without charge cotton received at railroad depots and cotton platforms in Oklahoma for shipment to concentrating points on the lines of said

respondents, provided said cotton is reshipped in ear-load lots from said concentrating points to the Texas gulf ports or Lake Charles, La.; and contemporaneously therewith the tariffs of said respondents, as so filed, have provided a charge of 5½ cents per square bale and 2½ cents per round bale on cotton received at the same railroad depots and cotton platforms in Oklahoma for shipment to concentrating points on the lines of said respondents, provided said cotton is reshipped from said concentrating points to destinations other than those just named.

(9) Since April 21, 1942, the plaintiff has incurred the loading charge on a small amount of cotton purchased by it and shipped from gin points on the lines of respondents in Oklahoma; however, there has been little movement of cotton from railroad depots and cotton platforms in Oklahoma to concentrating points on the lines of said respondents, since little of the cotton grown last season in Oklahoma still remains at gins.

(10) That as soon as the new crop comes on, which will be shortly after August 1, 1942, there will be substantial movements of cotton from railroad depots and cotton platforms in Oklahoma to concentrating points on the lines of said respondents, and that such cotton when loaded by said respondents will either be loaded free or for a charge dependent on the ultimate destination to which reshipped as explained in paragraph 8 above, and that the Company will purchase said cotton and will pay the freight charges thereon in the same manner as is heretofore described for the period prior to April 21, 1942.

(11) That in purchasing and shipping Oklahoma cot-

ton on which a loading charge is and will be incurred, the Company competes and will compete with merchants who are and will be free from such a charge on cotton loaded by said respondents and reshipped by said competing merchants in carload lots to the Texas gulf ports and to Lake Charles, Louisiana.

.....
L. T. BARRINGER,

Subscribed and sworn to before me this of

....., 1942.

.....
Notary Public.

My Commission expires, 19.....

[fols. 427-428] IN UNITED STATES DISTRICT COURT

DEFENDANT'S EXHIBIT No. 1

Interstate Commerce Commission

Washington

I, W. P. Bartel, Secretary of the Interstate Commerce Commission, do hereby certify that the attached is — true copy of Respondents' Reply to Petition of L. T. Barringer & Company for Reconsideration, filed March 16, 1942 in Investigation and Suspension Docket No. 4981; Loading Cotton in Oklahoma, the original of which is now on file and of record in the office of said Commission.

In Witness Whereof I have hereunto set my hand and affixed the Seal of said Commission this 6th day of July, A. D. 1942.

W. P. Bartel, Secretary of the Interstate Commerce Commission. (Seal.)

[fol. 429] BEFORE THE INTERSTATE COMMERCE COMMISSION

Loading Cotton in Oklahoma

L. & S. Docket 4981

RESPONDENTS' REPLY TO PETITION OF L. T. BARRINGER & COMPANY FOR RECONSIDERATION

(Figures in parentheses refer to pages of the reporter's transcript of the testimony)

Come now respondents and for reply to petition of L. T. Barringer & Company for reconsideration, say that such petition should be denied for the following reasons:

The petition cites five numbered reasons why the commission should reconsider the decision of Division 3. We will answer them in the order in which they are presented in the petition.

One. It is the claim of the petitioner that the Commission erred "in finding that there is a difference in circumstances and conditions surrounding cotton shipped from

Oklahoma to the Gulf ports, on the one hand, and cotton shipped from Oklahoma to the southeast and to the Carolinas, on the other hand, in the matter of truck competition [fol. 430] encountered by the respondents."

This is directed to the statement on sheet 9 of the decision wherein it is stated:

"Besides, there is no trucking of cotton from Oklahoma to Memphis or to the Southeast."

The Commission's statement is absolutely correct, as is shown by the record, wherein witness for respondents unqualifiedly stated there was no trucking of cotton from Oklahoma to Memphis or to the southeast (27, 50-51).

In the absence of any trucking from Oklahoma to Memphis and the southeast, and the fact that there is substantial trucking from Oklahoma to the Gulf ports, a difference in circumstances and conditions is demonstrated. As is shown in brief filed by respondents, and as contained in the Commission's decision, there is substantial trucking from Oklahoma to the Gulf ports; and while it was not possible to cite specific truck movements, or the extent to which cotton is trucked by tonnage figures, respondents know, as stated of record, upon investigation through their representatives and by conversations with interested shippers that the bulk of the truck movement from compress stations as well as trucking from gin origins to interstate destinations was to Texas Gulf ports.

With knowledge that trucking was being availed of from Oklahoma to the Gulf ports, it was certainly the prerogative of respondents to attempt to meet that competition without [fol. 431] awaiting for the entire movement to be diverted to motor vehicles.

Two. The second contention of petitioner was directed to the statement of the Commission on sheet 9, wherein it is stated:

"The reason for not providing for the absorption of the loading charge in Oklahoma on traffic destined to the Southeast is that the rates to the Southeast are already lower relatively than they are to the Texas ports."

Beginning at page 18 of the petition, the petitioner attempts to show that the Commission was wrong in making

such statement. The facts adduced of record demonstrate that the Commission was absolutely correct in making the statement that the rates to the south were relatively lower than to the Gulf ports. The petitioner attempts to discredit the statement of the Commission with comparisons of rates on a 75,000 pound minimum (now 65,000) to Houston with rates on a 50,000 pound minimum to Columbia, South Carolina. This is not a comparison of like with like. In order to make the necessary compensation for differences in minimum weights in connection with the rates which move the larger portion of the cotton, i.e., the 65,000 pound minimum to Gulf ports and the 50,000 pound minimum to the south, we compared the earnings under the rates for which these minimums are available.

When like is compared with like, in other words, when [fol. 432] the 25,000 pounds and the 50,000 pounds minimums and rates to Houston are compared with similar minimums and rates applicable to the south, a different picture is portrayed than that shown by petitioner.

Using the present carload rates to Houston and to Columbia, as shown in Exhibits 33 and 39, compared with the present Docket 17,000, Part 3, rates (which include Ex Parte 123 increases) as published in Agent Peel's I. C. C. 3139, the following results:

To:	17000-3 Net Rate	From Oklahoma City, Oklahoma. Carload Rates				% of 1700-3 Rate			
		Col. 1	Col. 2	Col. 3	Col. 4	Col. 1	Col. 2	Col. 3	Col. 4
Houston, Tex.	74	54		46	40	73.0		62.2	54.1
Columbia, S. C.	118	82	73	67		69.5	61.9	56.8	

Column 1—Minimum Weight 25,000 pounds.

Column 2—Minimum Weight 35,000 pounds.

Column 3—Minimum Weight 50,000 pounds.

Column 4—Minimum Weight 65,000 pounds.

The 40 cent rate from Oklahoma City to Houston, as shown in column 4 above, with a minimum of 65,000 pounds is a lower percentage of the net 17,000-3 rates than the 67 cent rate from Oklahoma City to Columbia, as shown in column 3 above, on a minimum of 50,000 pounds. However, the carriers require 15,000 pounds greater loading to [fol. 433] Houston to obtain the 40 cent rate than they do under the 67 cent rate to Columbia.

When percentages of the 25,000 and 50,000 minimum rates to Houston are compared with the rates to Columbia,

we find that the rates to Columbia are lower relatively as shown in the table next above. From the next above table, it will be observed that the 46 cent rate, minimum 50,000 pounds, is 62.2 per cent of the 17,000-3 rates, while the 73 cent rate, minimum 35,000 pounds, to Columbia is but 61.9 per cent of the 17,000-3 rates.

Petitioner also refers to the testimony of record, introduced by respondents, as to the comparisons from a revenue standpoint, of the rates on cotton with the first-class rates. The comparison made by protestant is as faulty as its comparison discussed above.

Limiting the percentage comparisons to use of rates with minimums at 65,000 pounds to Houston versus rates at 50,000 pounds to Columbia is misleading, in that the selection of only a single origin and a single destination does not take into account the differences in the origin and destination grouping in the class rate structure as compared with the grouping as to the cotton rates. In both instances the protestant has used Oklahoma City as an origin, which [fol. 434] is near the eastern boundary of Group 6660 (shown on Exhibit 32). Columbia, S. C., is in the southern part of the 67 cent destination group (shown on Map Exhibit 39). In the appendix attached hereto, we show the rates from all compress stations in Group 6660 to 4 representative mill points in Group 201 (in the southeast). We also show the rates to Houston. The first-class rates used were those prescribed by the Commission in the Twenty-first Supplemental Report in *Consolidated Southwestern Cases*, 205 I. C. C. 601, plus the Ex Parte 123 increases, as published in Agent Beel's I. C. C. 3359 and 3361.

From the compress points in Group 6660, we show in the table below the average of the rates to Houston and to Columbia under the various minimum weights applicable, and the percentages that such rates are of the first-class rates. From this composite statement, it will be readily observed that the rates to the southeast are relatively lower than to Houston.

To:	First Class	Carload Cotton Rates				% Cotton Rates are of First Class			
		25M	35M	50M	65M	25M	35M	50M	65M
Houston, Tex.	187 5	54 3		46 5	40 5	28 9		24 8	21 6
Columbia, S. C.	324 8	82	73	67		25 3	22 5	20 7	

[fol. 435] The average of the rates to the four representative southeastern destinations, as shown in the appendix, readily demonstrates that the rates to the southeast are relatively lower than the rates to Houston by a comparison with the first-class rates.

Three. The third reason advanced by petitioner is that the Commission did not recite the testimony offered by the witness for L. T. Barringer. Such testimony appears at pages 238 to 245 inclusive, of the transcript. If the Commission had included every word uttered by such witness, it could not have changed the Commission's decision, for the reason that such testimony does not in any wise indicate that the absorption of the loading charge in Oklahoma on cotton results in any violation of the Act.

Four. The fourth numbered reason advanced by petitioner is stated as follows:

"In finding in substance that differences in competitive conditions excuse an apparent violation of Section 2 of the Act."

There is *no apparent violation* of Section 2 of the Act, for the reason that in so far as these respondents are concerned, all shippers are treated alike.

The circumstances and conditions surrounding the transportation of cotton to the southeast are not substantially the same as those surrounding the transportation of the same property to the Gulf ports. Any shipper desiring to [fol. 436] avail himself of the absorption rule on traffic destined to the Gulf ports is accorded the same treatment in that the cost of loading will be absorbed if the cotton is offered for transportation at the carrier's platform.

Five. The fifth reason advanced by petitioner is that the Commission did not find that the rule under suspension was unlawful in violation of Sections 2 and 3 (1) of the Act.

From the testimony of record, the Commission could not find that the rule under suspension was in violation of any provision of the Act.

The prime and important consideration given by respondents was the fact that there was trucking of cotton from Texas and Oklahoma to the Gulf ports, and the Commission in *Cotton From and to Points in the Southwest and Memphis*, 282 I. C. C. 677, in Finding 8 required that

shippers to Lake Charles and the Texas Gulf ports for the same distances should be treated alike. The distances from Oklahoma to the Gulf ports are substantially the same as from Texas. Respondents felt that it was necessary, in view of the fact that costs for loading in Texas were being absorbed, that such costs of loading in Oklahoma should be absorbed.

The Commission in the instant proceeding has permitted the respondents to comply literally as well as with the spirit of Finding 8 in *Cotton from and to Points in the Southwest* [fol. 437] and *Memphis, supra*.

At the hearing respondents' witnesses testified that they had no objection to extending the destination territory beyond the Gulf ports. This the Commission has recognized by referring to such statements in its decision.

If petitioner is of the opinion, and can support such opinion by a showing, that the circumstances and conditions to the southeast are substantially similar to those to the Gulf ports, respondents would have no objection to absorbing the loading costs at origins in Oklahoma. But respondents feel that this Commission should not by an order require them to do so in view of the facts of record, as recited in the Commission's decision, that the circumstances and conditions are not substantially similar.

The record considered in its entirety, we submit that the Commission's decision by Division 3 is correct in every detail, and the petition should be denied.

Respectfully submitted, Charles S. Burg, Wm. E. Davis, R. S. Outlaw, Thomas F. King, H. C. Barron, Attorneys for Respondents.

1211 Railway Exchange, Chicago, Illinois. March 14, 1942.

[fol. 438]

Certificate of Service

I hereby certify that I have served the foregoing document on all parties of record in this proceeding by mailing a copy thereof, properly addressed, to each such party.

Dated at Chicago, Illinois, this fourteenth day of March, 1942.

By (Signed) H. C. Barron, Of Counsel.

(Here follows 1 paster, Appendix 1, side folio 439)

Houston, Texas

Charlotte, N. C.

To

From	Carload Cotton Rates				% Cotton Rates, Are of First Class				Carload Cotton Rates				% Cotton Rates, Are of First Class			
	Col. 1	Col. 2	Col. 3	Col. 4	Col. 1	Col. 2	Col. 3	Col. 4	Col. 1	Col. 2	Col. 3	Col. 4	Col. 1	Col. 2	Col. 3	Col. 4
First Class																
Anadarko, Okla.	187	54	46	40	28.9		24.6	21.4	320	82	73	67	25.6	22.8	20.9	
Chickasha, Okla.	182	54	46	40	29.7		25.3	22.0	317	82	73	67	25.9	23.0	21.1	
Clinton, Okla.	201	60	52	46	29.9		25.9	22.9	325	82	73	67	25.2	22.5	20.6	
Elk City, Okla.	201	60	52	46	29.9		25.9	22.9	342	82	73	67	24.0	21.3	19.6	
Hobart, Okla.	192	54	46	40	28.1		24.0	20.8	342	82	73	67	24.0	21.3	19.6	
Oklahoma City, Okla.	192	54	46	40	28.1		24.0	20.8	308	82	73	67	26.6	23.7	21.8	
Pauls Valley, Okla.	177	51	44	38	28.8		24.9	21.5	308	82	73	67	26.6	23.7	21.8	
Waurika, Okla.	168	47	40	34	28.0		23.8	20.2	322	82	73	67	25.5	22.7	20.8	
Average	187.5	54.3	46.5	40.5	28.9		24.8	21.6	323	82	73	67	25.4	22.6	20.8	
To																
Columbia, S. C.																
Anadarko, Okla.	320	82	73	67	25.6	22.8	20.9		339	82	73	67	24.2	21.5	19.8	
Chickasha, Okla.	317	82	73	67	25.9	23.0	21.1		336	82	73	67	24.4	21.7	19.9	
Clinton, Okla.	325	82	73	67	25.2	22.5	20.6		347	82	73	67	23.6	21.0	19.3	
Elk City, Okla.	339	82	73	67	24.2	21.5	19.8		352	82	73	67	23.3	20.7	19.0	
Hobart, Okla.	339	82	73	67	24.2	21.5	19.8		352	82	73	67	23.3	20.7	19.0	
Oklahoma City, Okla.	308	82	73	67	26.6	23.7	21.8		327	82	73	67	25.1	22.3	20.5	
Pauls Valley, Okla.	308	82	73	67	26.6	23.7	21.8		327	82	73	67	25.1	22.3	20.5	
Waurika, Okla.	323	82	73	67	25.4	22.6	20.7		342	82	73	67	24.0	21.3	19.6	
Average	322.4	82	73	67	25.5	22.7	20.8		340.3	82	73	67	24.1	21.4	19.7	
To																
Greenville, S. C.																
Anadarko, Okla.	315	82	73	67	26.0	23.2	21.3		323.5	82	73	67	25.3	22.6	20.7	
Chickasha, Okla.	311	82	73	67	26.4	23.5	21.5		320	82	73	67	25.6	22.8	20.9	
Clinton, Okla.	320	82	73	67	25.6	22.8	20.9		329	82	73	67	24.9	22.2	20.4	
Elk City, Okla.	327	82	73	67	25.1	22.3	20.5		340	82	73	67	24.1	21.5	19.7	
Hobart, Okla.	327	82	73	67	25.1	22.3	20.5		340	82	73	67	24.1	21.5	19.7	
Oklahoma City, Okla.	298	82	73	67	27.5	24.5	22.5		310	82	73	67	26.5	23.5	21.6	
Pauls Valley, Okla.	298	82	73	67	27.5	24.5	22.5		310	82	73	67	26.5	23.5	21.6	
Waurika, Okla.	317	82	73	67	25.9	23.0	21.1		326	82	73	67	25.2	22.4	20.6	
Average	314.1	82	73	67	26.1	23.3	21.4		324.8	82	73	67	25.3	22.5	20.7	

Average to Carolina Points

Authorities for cotton rates shown on Exhibits 33 & 39.

Class Rates—J. R. Peel's ICC's 3359 and 3361.

Col. 1—Minimum Weight 25,000 lbs.
 Col. 2—Minimum Weight 30,000 lbs.
 Col. 3—Minimum Weight 50,000 lbs.
 Col. 4—Minimum Weight 65,000 lbs.

[fol 440] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1942

No. 520

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION
OF THE RECORD TO BE PRINTED—Filed November 25, 1942

Now comes L. T. Barringer and Company, appellant, and says that it will rely on brief and oral argument in the above-entitled cause upon the following points:

I. The lower court erred in entering a general finding in which it adopted as its own the findings of fact of the Interstate Commerce Commission without specification of the language of the Commission considered by the Court to constitute findings of fact.

II. The report of the Interstate Commerce Commission lacks essential findings sufficient to disclose (a) the factual predicate for its ultimate conclusion; (b) the manner in which it construed and applied the statutory standards of lawfulness; or (c) a rational basis for the ultimate finding and order.

III. If the report of the Interstate Commerce Commission be construed as finding that there is a difference in the matter of truck competition as between cotton from Oklahoma transported from the Southeast, on the one hand, and to the Texas-Gulf ports, on the other, such finding is without support in the evidence as to cotton loaded at the particular Oklahoma origins at which the tariff provisions under investigation applied.

IV. If the report of the Interstate Commerce Commission be construed as finding, as a predicate for its ultimate [fol 441] conclusion, that the line-haul rates on cotton from the Oklahoma origins to the Southeast are relatively lower than to the Texas-Gulf ports, such finding is without support in the evidence.

V. In determining that neither Sections 2 nor 3 of the Interstate Commerce Act would be violated by the elimination of a charge for the loading of cotton when reshipped to Texas-Gulf ports, even though the existing separately established charge for the loading of cotton at the same origins would continue to apply when cotton from the same

origins is reshipped to the Southeast, the Interstate Commerce Commission exceeded its authority in the following particulars:

(a) In treating the alleged difference in relative levels of the line-haul rates as a matter relevant to the issues under Sections 2 and 3; and

(b) In considering the alleged difference in the matter of truck competition for the line-haul movement as constituting a dissimilarity of circumstances and conditions within the meaning of Section 2.

VI. In determining whether Section 2 of the Interstate Commerce Act would be violated by the elimination of the charge for the loading of cotton when reshipped to Texas-Gulf ports while contemporaneously continuing a separately established charge at the same origins for an identical loading service on cotton reshipped to the Southeast, the difference in the matter of ultimate destinations does not constitute a dissimilarity of traffics, services, or circumstances or conditions within the meaning of said section.

VII. The tariff rule approved by the Interstate Commerce Commission is unjustly discriminatory in violation of Section 2 of the Interstate Commerce Act as a matter of law, there being no room for administrative judgment.

And appellant, in conformity with a stipulation between the parties, transmitted herewith, hereby designates the following parts of the record considered by it as necessary for the consideration of the points upon which it will rely: [fol. 442] The whole record, except the following exhibits introduced in evidence in the District Court: Plaintiff's Exhibit 4, and that portion of Plaintiff's Exhibit 2, which consists of Exhibits 1 to 41, both inclusive, introduced at the hearing before the Interstate Commerce Commission.

Nuel D. Belnap, Counsel for Appellant.

Dated November 23, 1942.

Affidavit

COUNTY OF COOK,

State of Illinois, ss:

Nuel D. Belnap, being duly sworn, deposes and says that he is the attorney of record for L. T. Barringer and Com-

pany, the appellant herein, and that he has served copies of the above statement upon all of the appellees, same being deposited, properly addressed, to the attorneys of record, in the United States mails at Chicago, Illinois, on the 23rd day of November, 1942, in sealed envelopes, first class postage prepaid, said attorneys being:

Mr. Charles Fahy, Solicitor General, Department of Justice, Washington, D. C.

Mr. J. Stanley Payne, Asst. Chief Counsel, Interstate Commerce Commission, Washington, D. C.

Mr. Roland J. Lehman, 1211 Railway Exchange Bldg., Chicago, Illinois.

Mr. R. S. Outlaw, 1211 Railway Exchange Bldg., Chicago, Illinois.

Mr. C. S. Burg, Railway Exchange Building, St. Louis, Missouri.

Mr. W. E. Davis, K. S. C. Bldg., Kansas City, Missouri.

Nuel D. Belnap.

Subscribed and sworn to before me, a Notary Public, in Chicago, Illinois, this 23rd day of November, 1942. Arleta T. Thompson. My commission expires November 16, 1946. (Notarial seal.)

[fol. 443] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1942

No. 520

STIPULATION AS TO PRINTING RECORD AND EXHIBITS—Filed
November 25, 1942

It is stipulated by the parties hereto that the following shall govern the printing of the record in the District Court in the appeal in the above-entitled cause:

Print the entire record except the exhibits introduced at the hearing before the Commission, designated as Exhibits Nos. 1 to 41, both inclusive, said exhibits being a part of plaintiff's Exhibit No. 2 introduced in evidence before the District Court, and except plaintiff's Exhibit No. 4 introduced in evidence before the District Court.

It is further stipulated and agreed that any party hereto may refer to said exhibits, which are not to be printed, in their briefs and arguments with like effect as though they were printed as part of the record.

Nuel D. Behnap, Counsel for Appellant. Charles [fol. 444] Fahy, Solicitor General, Counsel for the United States, Appellee. J. Stanley Payne, Counsel for the Interstate Commerce Commission, Appellee. Roland J. Lehman, Counsel for The Atchison, Topeka and Santa Fe Railway Company, et al., Appellees.

[fol. 445] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

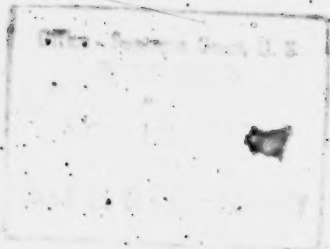
No. 520

ORDER NOTING PROBABLE JURISDICTION—December 7, 1942

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: File No. 47021. Western Tennessee, D. C. U. S. Term No. 520. L. T. Barringer and Company, Appellant, vs. The United States of America, Interstate Commerce Commission, Atchison, Topeka and Santa Fe Railway Company, et al. Filed November 12, 1942. Term No. 520/O. T. 1942.

NO. 320



IN THE
District Court of the United States
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

L. T. BARRINGER AND COMPANY,	} Civil Action
Plaintiff,	
vs.	
UNITED STATES OF AMERICA and	} File No. 431
INTERSTATE COMMERCE COMMIS-	
SION,	
Defendants.	

**JURISDICTIONAL STATEMENT BY PLAINTIFF
UNDER RULE 12 OF THE REVISED RULES
OF THE SUPREME COURT OF THE
UNITED STATES.**

L. T. Barringer and Company, plaintiff, respectfully presents the following statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment or decree in the above-entitled cause sought to be reviewed:

A. Statutory provisions.

The statutory provisions believed to sustain the jurisdiction of the Supreme Court are:

U. S. C., Title 28, Section 41 (28) [Act of June 18, 1910, c. 309, section 1, 36 Stat. 539; as amended March 3, 1911, c. 231, section 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219].

U. S. C., Title 28, Section 44 [Act of October 22, 1913, c. 32, 38 Stat. 220; as amended February 13, 1925, c. 229, section 1, 43 Stat. 938; October 22, 1913, c. 32, 38 Stat. 220].

U. S. C., Title 28, Section 45 [Act of June 18, 1910, c. 309, section 1, 36 Stat. 539; as amended March 3, 1911, c. 231, section 209, 36 Stat. 1149; October 22, 1913, c. 32, 38 Stat. 219].

U. S. C., Title 28, Section 46 [Act of June 18, 1910, c. 309, section 3, 36 Stat. 542; as amended March 3, 1911, c. 231, section 208, 36 Stat. 1149; October 22, 1913, c. 32, 38 Stat. 218].

U. S. C., Title 28, Section 47 [Act of October 22, 1913, c. 32, 38 Stat. 220].

U. S. C., Title 28, Section 47a [Act of March 3, 1911, c. 231, section 210, 36 Stat. 1150; as amended October 22, 1913, c. 32, 38 Stat. 220].

U. S. C., Title 28, Section 345 [Act of March 3, 1911, c. 231, section 238, 36 Stat. 1157; as amended January 28, 1915, c. 22, section 2, 38 Stat. 804; February 13, 1925, c. 229, section 1, 43 Stat. 938].

B. The statute of a state, or the statutes or treaty of the United States, the validity of which is involved.

The validity of a statute of a state, or of a statute or treaty of the United States, is not involved.

C. The date of the judgment or decree sought to be reviewed and the date upon which the application for appeal was presented.

The decree sought to be reviewed was entered on August 17, 1942. The petition for appeal was presented and allowed on October 7, 1942, together with the assignment of errors.

D. Nature of the case and of the rulings of the Court bringing the case within the jurisdictional provisions relied on.

This is an appeal from a decree of a specially constituted three-judge statutory court, convened under the provisions of the Urgent Deficiencies Appropriations Act, October 22, 1913, c. 32, 38 Stat. 220 (U. S. C., Title 28, Section 47), in the District Court of the United States for the Western District of Tennessee, Western Division, which decree was rendered August 17, 1942. Plaintiff had filed its complaint to enjoin, annul, and set aside an order of the Interstate Commerce Commission entered in its proceeding *Investigation and Suspension Docket No. 4981*.

The proceeding before the Commission came about as follows: Cotton produced in Oklahoma is transported via rail in small lots from gin points to concentrating points, at which latter points it is concentrated (assembled into carload lots) and reshipped under

4

transit in carloads to the Gulf ports and to domestic mills located in the Southeast and the Carolinas. The primary obligation of loading the cotton at gin points is on the shippers since the movement is in carload rates, which rates are generally considered as not including the services of loading or unloading. However, for many years the railroads who intervened as defendants in this suit provided by their tariffs that, if requested, they would perform the loading service at the inception of the movement from gin origins to concentrating points, provided the shipper tendered his cotton to them at railroad depots or cotton platforms. These tariffs further provided that when such loading service is rendered, a separate charge would be made therefor of 5.5 cents per square bale and 2.5 cents per round bale.

By tariffs filed to become effective July 11, 1941, the intervening railroad defendants proposed to cancel this loading charge as to cotton reshipped from concentrating points in carload to Texas Gulf ports and to Lake Charles, La., while continuing the charge on cotton loaded at the same gin points and reshipped in carloads from the same concentrating points to all other destinations. The plaintiff, a corporation which purchases cotton in Oklahoma for shipment to domestic mills in the Southeast and the Carolinas in competition with other merchants purchasing cotton at same origins for shipment to the Texas Gulf ports, protested this change in the tariffs to the Interstate Commerce Commission on the ground that if made effective it would violate Sections 2 and 3 of the Interstate Commerce Act. Section 2 prohibits unjust discrimination which the section defines as the collection from any person of a greater or less compensation for any service rendered in the transportation of property than is col-

lected from any other person for doing him a like and contemporaneous service in the transportation of like traffic under substantial similar circumstances and conditions. Section 3 prohibits undue preference and prejudice as between persons, localities, particular descriptions of traffic, etc. Thereupon, the Interstate Commerce Commission suspended the operation of the proposed tariffs pending an investigation into the lawfulness thereof as authorized by Section 15 (7) of the Interstate Commerce Act.

Hearing was had and after briefs and oral argument, the Commission, Division 3, issued its report and order on January 29, 1942, finding that the proposed change was just and reasonable and not shown to be otherwise unlawful. Accordingly, it vacated the suspension order and discontinued the proceedings. Plaintiff filed its petition for reconsideration, which was denied, and the new tariffs finally went into effect on April 21, 1942. By its complaint in the District Court, the plaintiff sought to enjoin, annul, and set aside the order of the Commission which vacated the order of suspension and discontinued the proceedings on the ground that the Commission has not exercised its authority in accordance with the governing statute.

The three-judge court held a hearing on the plaintiff's application for injunction on July 8, 1942, after answers had been filed by the defendants, United States and Interstate Commerce Commission, and the intervening defendants, who were the railroads publishing the involved tariffs. The record before the Commission was offered and received in evidence, together with other exhibits, and briefs were filed. After hearing oral argument and receiving suggested findings of fact and conclusions of law, the court handed down its decision

dismissing the complaint, making certain findings of fact and conclusions of law which plaintiff seeks to have reviewed by this appeal.

The principal questions involved on appeal as to which the trial court held against the plaintiff are: (a) Does the report and order of the Commission contain essential basic findings sufficient to disclose a correct construction and application of the Interstate Commerce Act to the facts of record; (b) Are the findings of the Interstate Commerce Commission supported by the evidence; (c) Did the Interstate Commerce Commission correctly construe and apply Sections 2 and 3 of the Interstate Commerce Act; and (d) In arriving at its ultimate conclusion, did the Commission give consideration to matters which could not legally influence its judgment? The following cases are believed to sustain the jurisdiction of the Supreme Court to review such questions on appeal:

(a) *United States v. Carolina Freight Carriers Corporation* (1942), 315 U. S. 475;

United States v. Chicago, M. St. P. & P. R. Co. (1935), 294 U. S. 499, 506;

(b) *Baltimore & Ohio R. R. Co. v. United States*, (1924), 264 U. S. 258, 262-3;

Florida E. C. R. Co. v. United States (1914), 234 U. S. 167, 186, 188;

(c) *Rochester Telephone Corporation v. United States* (1939), 307 U. S. 125, 134, 142;

Central Railroad Co. of New Jersey v. United States (1921), 257 U. S. 247;

Interstate Commerce Commission v. D. L. & W. R. Co. (1911), 220 U. S. 235, 253-4;

(d) *Mitchell v. United States* (1941), 313 U. S. 80;

Ann Arbor R. Co. v. United States (1930), 281 U. S. 658, 666;

Southern P. Co. v. Interstate Commerce Commission (1911), 219 U. S. 433.

E. The questions involved are substantial.

The more important questions involved in this case are as to statutory construction and application.

As to Section 2 of the Interstate Commerce Act the questions are: (1) Does the competition of the railroad defendants with carriers by motor truck for cotton shipped from points in Oklahoma to Gulf ports, when accompanied by a lack of such competition as to cotton shipped from identical stations to the Southeast, constitute a dissimilarity of circumstances and conditions within the meaning of the section so as to make the prohibition of the section inapplicable to the granting of a free loading service in the one instance and the assessment of a separately stated charge for an identical loading service in the other instance; (2) Does the difference in ultimate destinations to which the cotton is shipped after loading constitute such a dissimilarity of circumstances and conditions in a case which involves only the lawfulness of a proposal to make a difference in the charges assessed for an identical loading service; (3) Does the difference in the relative levels of the rates assessed for the line-haul services, which rates are separately stated from the loading charge, constitute such a dissimilarity of circumstances and conditions when the issue involves only the loading charge? The Commission and the trial court disposed of the case on the theory that each of the foregoing questions should be answered in the affirmative. That would seem to be contrary to the construction accorded Section 2 of the Interstate Commerce Act in *Wight v. United States* (1897), 167 U. S. 512; *Interstate Commerce Commission v. Delaware, L. & W. R. Co.* (1911), 220 U. S. 235; *Interstate Commerce Commission v. B. & O. R. R. Co.* (1912), 225 U. S. 326; *Seaboard Air Line*

Railway Co. v. United States (1920), 254 U. S. 57.

The foregoing cases hold that the only circumstances and conditions to be considered in applying Section 2 are those which relate directly to the physical service for which the particular charges in issue are applied. By analogy it would seem that a difference in truck competition for the line-haul move, a difference in destinations, and a difference in the relative levels of the line-haul rates are not within the circumstances and conditions to be considered in applying Section 2 in a case which involves only the accessorial service of loading and the charges therefor. Whether the suggested analogy is sound is a question of substantial importance and its determination is necessary in order to provide definite guidance for the Interstate Commerce Commission and those who appear before it as to the precise application of Section 2.

As to Section 3, the question is: When the only matter in issue is the lawfulness of a proposed tariff which relates to a separately stated charge for loading cotton at point of initial shipment, the proposal being to eliminate such separately stated charge on cotton shipped to Gulf ports and to continue such separately stated charge on cotton shipped from the same origins to the Southeast, did the Commission act within its authority when it concluded that the assailed difference in these charges is justified because it is offset by a relatively lower rate for line-haul service to the Gulf ports than to the Southeast. The conclusion of the Commission just mentioned, which the trial court approved, would seem to be contrary to the rule announced in *Interstate Commerce Commission v. Stickney* (1909), 215 U. S. 98, 105, 109. In that case, however, the Supreme Court dealt with the powers of the Commission under Section 1 of the Act holding that the Commission had no authority.

when passing upon the reasonableness of a separately stated terminal charge, to merge that charge with the rates for line-haul transportation before passing upon the lawfulness thereof. This case presents the same question under Section 3 of the Act, which is a legal question of substantial importance.

The case also involves questions as to the lack of basic findings in the report and as to the failure of the evidence to support the findings made. While these questions are of immediate importance only to those who were parties to the litigation before the Commission, they are believed to be substantial questions from the standpoint of orderly and reasoned procedure.

F. Decree, findings of fact, and conclusions of law of the District Court.

A copy of the opinion, and of the findings of fact and conclusions of law of the District Court, and a copy of the decree sought to be reviewed, are appended to this statement.

Plaintiff, therefore, respectfully submits that the Supreme Court of the United States has jurisdiction of the appeal.

Dated October 7, 1942.

AUVERGNE WILLIAMS,
Exchange Building,
Memphis, Tennessee.

NUEL D. BELNAP,
2106 Field Building,
Chicago, Illinois.

*Attorneys for L. T. Barringer and
Company, Plaintiff.*

APPENDIX TO THE JURISDICTIONAL STATEMENT.

IN THE DISTRICT COURT OF THE UNITED STATES
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

La T. Barringer & Company,	} Civil Action No. 431.
<i>Plaintiff,</i>	
v.	
United States of America and Interstate Commerce Commission,	
<i>Defendant.</i>	

*Before Martin, Circuit Judge, and
Darr and Boyd, District Judges.*

PER CURIAM: This cause came on to be heard on the complaint of La T. Barringer & Company praying a perpetual injunction and cancellation of the operation and effect of an order of the Interstate Commerce Commission dated January 29, 1942, and upon the responsive pleadings of the defendants and interveners, and upon the full record in the cause, including the order of the Interstate Commerce Commission, the transcript of the hearing before the Interstate Commerce Commission, and exhibits filed and considered at such hearing.

The Court is of opinion that the Interstate Commerce Commission, in its report, made essential basic findings of fact, supported by substantial evidence of record; and that the order of the Commission is lawful.

Contemporaneously herewith, the Court has filed findings of fact and conclusions of law deemed appropriate.

The complaint, accordingly, is dismissed with proper costs.

Entered—July 17, 1942.

JOHN D. MARTIN,

Circuit Judge.

LESLIE R. DARR,

District Judge.

MARION S. BOYD,

District Judge.

IN THE DISTRICT COURT OF THE UNITED STATES
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

L. T. Barringer & Company,	} Civil Action No. 431.
<i>Plaintiff,</i>	
v.	
United States of America and Interstate Commerce Commission, <i>Defendants.</i>	

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

In the above entitled case, the Court makes the following findings of fact and of law:

FINDINGS OF FACT.

1. For some years prior to April 21, 1942, the railroads which have intervened in this suit and the Oklahoma Railway Company maintained on cotton re-shipped from concentrating points under carload rates a loading charge of 5.5 cents per square bale and 2.75 cents per round bale if the cotton was loaded by said railroads at a point of origin served by them in Oklahoma after tender to said railroads at a depot or cotton platform for shipment therefrom to the concentrating point.

2. Said loading charge is contained as a separate item in the rate and transit tariffs filed by said railroads with the Interstate Commerce Commission (hereinafter referred to as the Commission) and applied to all such cotton so tendered and loaded by said railroads, regardless of the ultimate destination to which said cotton was reshipped in carloads from the concentrating point.

3. Said loading charge was a charge which was maintained and assessed by the individual railroad performing the loading service.

4. The cotton to which said loading charge applied was handled and the rates and charges accruing thereon were collected in the following manner: The cotton originated at a country station (hereinafter referred to as a gin point) at which point it was tendered to the railroad at its depot or cotton platform by a shipper, with the request that the cotton be loaded by the railroad and transported to a nearby compress. When so tendered, the carrier loaded the cotton into a car, utilizing the labor of its agency forces or section gangs. The cotton was then transported in lots of one bale or more to the nearby compress specified by the shipper and, upon said movement, the carrier collected its local "float-in" or transit rate for the inbound line-haul service from the gin point to the compress station. Ordinarily, the charge for loading was not collected at that time but, as authorized by the railroad tariffs, followed the shipment as an advance charge, such advance charge being inserted in the original bill of lading. At some later date, after compression, the cotton was reshipped in a carload lot to a final destination, such as a gulf port or a domestic mill in the southeast or the Carolinas. At the time of that reshipment, the carrier collected its carload rate from the compress station to final destination for the outbound line-haul service rendered. The carriers maintained in tariffs filed with the Commission various levels of carload rates made dependent upon the minimum weight loaded, the different carload rates being governed by minima of 25,000, 35,000, 50,000, and 65,000 pounds. On cotton so transported, the railroad tariffs authorized a subsequent readjustment of the inbound and outbound rates as originally assessed for

line-haul services to the basis of the through carload rate from the gin point to final destination. This is called a transit settlement and the loading charge, when applicable, was ordinarily collected at the time the transit settlement was made.

5. By tariffs filed with the Commission to become effective June 11, 1941, the railroads referred to in paragraph 1 above (said railroads being hereinafter referred to as respondents) proposed to cancel the loading charge hereinabove described on cotton reshipped to Beaumont, Corpus Christi, Galveston, Houston, Orange, Port Arthur, and Texas City, Texas, and Lake Charles, La. (said destinations being hereinafter referred to as the Texas ports), and to continue said loading charge on cotton reshipped in carloads from concentrating points to all other destinations.

6. On petition and protest from numerous interests, including L. T. Barringer and Company, the plaintiff herein, the Commission, acting under the authority conferred upon it by Section 15(7) of the Interstate Commerce Act entered an order on June 10, 1941, which postponed the effective date of said schedules until January 11, 1942, and instituted an investigation into the lawfulness thereof. The proceeding instituted by the Commission was entitled Investigation and Suspension Docket No. 4981, Loading Cotton in Oklahoma, and will be hereinafter referred to as I. & S. 4981. Subsequently, the respondents further postponed the effective date of said schedules until the termination of the proceedings before the Commission.

7. Hearing was had in I. & S. 4981 before an examiner of the Commission at New Orleans, La., on July 19, 1941, at which evidence was received from the respondents who supported the schedules and from the pro-

testants, including the plaintiff, who opposed the proposed schedules.

8. On January 29, 1942, after full hearing, brief, and oral argument, the Commission, by Division 3, entered a report in I. & S. Docket No. 4981 setting forth its findings of fact and conclusions, and holding that the elimination of the loading charge on cotton originating in Oklahoma, compressed in transit, and moving from the compress points to the Gulf ports in question at the carload rate from origin point is just and reasonable and not otherwise unlawful. With said report, and as a part thereof, the Commission entered an order dated January 29, 1942, which vacated and set aside the previously entered order of suspension in I. & S. Docket 4981 as of February 21, 1942, and discontinued the proceeding.

9. On February 18, 1942, the plaintiff filed with the Commission its petition for reconsideration in said proceeding in which it urged that under the facts and law the Commission should have found the proposal to be unlawful and in violation of Sections 2 and 3 of the Interstate Commerce Act, and requested that the report and order of January 29, 1942, be modified accordingly and the respondents be required to cancel the proposed change. The Commission, pending action on that petition, deferred the effective date of its order of January 29, 1942, to April 21, 1942.

10. By order of April 13, 1942, the Commission denied the petition of the plaintiff for reconsideration and the change in the tariff schedules was permitted to and did become effective on April 21, 1942, and is now in effect.

11. Plaintiff, L. T. Barringer and Company, a cotton merchant of Memphis, Tennessee, by bill of complaint

filed on or about May 11, 1942, prays that this Court perpetually enjoin and set aside the operation and effect of the said order of the Commission of January 29, 1942.

12. By order entered on June 29, 1942, the Atchison, Topeka & Santa Fe Railway Company, Gulf, Colorado & Santa Fe Railway Company, Panhandle & Santa Fe Railway Company, Missouri-Kansas-Texas Railroad Company and Kansas City Southern Railway Company, respondents before the Commission in I. & S. Docket No. 4981, were permitted to intervene as parties defendant herein.

13. The physical service of loading cotton tendered to a respondent at any particular depot or cotton platform in Oklahoma for shipment to a particular concentrating point is the same on cotton subsequently reshipped in a carload from the concentrating point to the Texas ports as on cotton subsequently reshipped in a carload from the concentrating point to other destinations, such as domestic mill points in the southeast or the Carolinas.

14. The tariff change approved by the Commission provides for the loading of cotton without charge when reshipped from concentrating point, in carloads, to the Texas ports only if the cotton is tendered to a respondent at its depot or cotton platform at the inception of the inbound line-haul move from gin point to compress station, and does not apply to cotton loaded into a car at a compress, and does not apply to cotton other than that which moves from the station at which loaded to a concentrating point on the basis of inbound "float-in" or transit rates.

15. Hearing before this Court, specially constituted of three Judges as required by the Urgent Deficiencies

Act, was held July 8, 1942. A certified copy of the oral testimony and documentary exhibits introduced in the proceeding before the Commission, and certain other documents considered by the Commission, were received in evidence by the Court, together with an affidavit filed by plaintiff, which was received solely on the question whether plaintiff possesses sufficient legal interest to bring and maintain this suit.

16. With its order of January 29, 1942, the Commission issued a report containing its findings of fact, decision and conclusions.

17. Upon the hearing before the Commission, the respondents sought to justify the difference in the charges for loading cotton reshipped to the Texas ports, on the one hand, as compared with the charges for loading cotton reshipped to all other destinations, on the other hand, on two grounds, among others, &c., (1) they urged that the free loading to the Texas ports was necessary to meet truck competition and that there was no truck competition to the southeast and to the Carolinas; and (2) they contended that the difference in loading charge was justified because the carload rates assessed for the line-haul services from Oklahoma to the southeast and the Carolinas are relatively lower than the carload rates assessed for the line-haul services from Oklahoma to the Texas ports.

18. As to the first ground: the evidence before the Commission showed the same truck competition from gin points to compress stations for cotton later reshipped to the southeast and the Carolinas as for cotton later reshipped to the Texas ports.

19. As to the first ground: the evidence also showed there was no truck competition from Oklahoma compresses to southeastern or Carolina destinations, al-

though there was truck competition from Oklahoma compresses to the Texas ports.

20. As to the first ground: the only destination embraced within the term "Texas ports" for which any evidence was presented as to specific tonnage of cotton transported by truck from Oklahoma gin points was Houston, Texas.

21. As to the second ground: the evidence before the Commission was confined to a comparison of the rates, distance, ton mile earnings, and car-mile earnings involved, but no evidence was offered as to the specific costs of the respective line-haul services or as to any transportation circumstance and condition incident to line-haul services other than the mere matter of distance.

22. The evidence offered before the Commission by the plaintiff showed that it purchases cotton in Oklahoma for reshipment to the southeast and Carolinas in competition with other merchants purchasing cotton in Oklahoma for reshipment to the Texas ports; that if the proposed change were permitted to become effective, the plaintiff would be compelled to pay a charge for having its cotton loaded by the respondents, while its competitors would be able to obtain a similar loading service from the respondents without charge; and that this difference in charges would impose a competitive disadvantage upon the plaintiff in the purchasing of Oklahoma cotton.

23. The Court adopts as its own the findings of fact set forth in the said report of the Commission.

24. The Commission found, *inter alia*, that there is (1) no trucking of cotton between points in Oklahoma and the Southeast, whereas there is trucking of cotton between points in Oklahoma and the Gulf ports, (2) that

the carload rates on cotton from Oklahoma origins to the Southeast are on a relatively lower basis than the carload rates on cotton from the same origin to the Gulf ports, and (3) that the rates from points in Oklahoma both to the Southeast and to the Gulf ports are depressed.

25. The Commission also found, *inter alia*:

"In the Southwestern Cotton case the Commission at page 724 said:

"The practices which may have prevailed in the past with respect to free transit are no criteria in the present circumstances. In the past there was substantially no unregulated competition and the rates were not depressed. If the carriers gave a free service in one instance it was not unreasonable to expect them to give it in another. Now the situation has changed. In the present circumstances it is not only the carriers' right but their duty to conduct their operations in the most economical manner possible, in order to retain the greatest net revenue out of the low competitive rates which they are compelled to charge. The fact that they have provided certain transit services without charge in addition to the transportation rates, in instances where that seems to be good business policy from a competitive standpoint affords no basis for requiring them to assume the additional burden and expense incident to such services where the opportunities for corresponding benefits to them are lacking."

"This was said with reference to the circumstances which distinguish the granting of transit in the interior but not at the ports. It applies with equal force to either of the situations presented in the proceedings now before us."

26. The ultimate findings of the Commission were:

"We, therefore, find that the elimination of the rail carriers' loading charge on cotton originating in Oklahoma on respondents' lines, compressed in transit and moving from compress point to Texas-Gulf ports and Lake Charles, La., at the carload rate from origin point, is just and reasonable and not shown to be otherwise unlawful."

"We further find that the re-establishment of the loading charge on shipments of cotton originating in Texas on the St. Louis, San Francisco and Texas Railway Company and destined to the same points, including New Orleans, La., for export, is just and reasonable and not shown to be otherwise unlawful."

CONCLUSIONS OF LAW.

1. The Interstate Commerce Commission in its report made essential basic findings of fact, supported by substantial evidence of record.

2. The Commission did not exceed its authority and the power conferred upon it by the Interstate Commerce Act in entering the order sought to be enjoined, and the Commission's action was not arbitrary.

3. The findings of the Commission are adequately supported by substantial evidence.

4. In determining whether or not the provisions of Sections 2 and 3 of the Interstate Commerce Act have been violated by the publication of the tariffs under consideration herein the Commission properly considered the dissimilarity in circumstances and conditions between the line-haul movement of cotton from Oklahoma origins to the southeast and the line-haul movement of cotton from Oklahoma points to the Gulf ports here involved.

5. The Commission's findings support its ultimate conclusion that the rail tariffs under consideration are just and reasonable and not otherwise unlawful.

Entered July 17, 1942.

JOHN D. MARTIN,
Circuit Judge.

LESLIE R. DARR,
District Judge.

MARION S. BOYD,
District Judge.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TENNESSEE.

L. T. Barringer & Company,

Plaintiff,

vs.

United States of America and
The Interstate Commerce Commission,
Defendants.

Civil No. 431.

FINAL DECREE.

This cause having been heard upon the pleadings, the testimony and exhibits submitted before the Interstate Commerce Commission, and the oral and written arguments of counsel, and the Court now being fully advised in the premises, it having made and entered findings of fact and conclusions of law, it is by the court this 17th day of August, 1942:

Ordered, Adjudged and Decreed, That the complaint be, and it is hereby, dismissed for want of equity at the plaintiff's costs.

JOHN D. MARTIN,

United States Circuit Judge.

LESLIE R. DARR,

United States District Judge.

MARION S. BOYD,

United States District Judge.

FILE COPY

APR 10 1943

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 520

L. T. BARRINGER AND COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION, THE ATCHISON,
TOPEKA AND SANTA FE RAILWAY COM-
PANY, *et al.*,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TENNESSEE.

BRIEF ON BEHALF OF APPELLANT

LUTHER M. WALTER,
JOHN S. BURCHMORE,
NUEL D. BELNAP,

Counsel for Appellant.

TABLE OF CONTENTS.

	PAGE
Opinions below	1
Jurisdiction	2
Questions presented	2
The statutes involved.....	3
Statement of the case.....	5
I. Proceedings in the District Court.....	5
•II. Proceedings before the Commission.....	6
A. The proposed change.....	6
B. The suspension and investigation proceed- ings	11
C. The contentions of the railroad proponents	12
D. The contentions of appellant.....	13
E. The report of the Commission, Division 3	16
1. Recitals as to the contentions of the pro- ponents	16
2. Recitals as to the contentions of the appel- lant	18
3. The findings of the Commission as to the pertinent facts	19
4. The order of the Commission.....	21
Specification of errors to be urged.....	22
Summary of Argument.....	23
Argument	25
I. The order of the Commission is not supported by the findings in the report.....	25
II. The order of the Commission is not supported by the evidence.....	31

III. The order of the Commission is based upon considerations not legally relevant to the issues and upon standards of lawfulness not authorized by the statute.....	35
A. The matters entitled to consideration under Section 2 are limited to those which relate directly to the loading service and to charges therefor	36
1. A difference in charges for identical loading services at the inception of the "float-in" move is not taken out of Section 2 by a difference in the destinations to which the cotton is subsequently re-shipped from the concentration points...	37
2. The alleged difference in the relative levels of the through line-haul rates, and the alleged difference in the matter of truck competition, did not constitute a dissimilarity of circumstances and conditions within the meaning of Section 2..	43
B. The lawfulness under Section 3(1) of separately stated terminal charges for loading must be tested independently and without merging them with through rates for line-haul transportation	46
Conclusion	48
Appendix "A", Statutes cited.....	49
Appendix "B", Reproduction of Exhibit 38 in the Commission's proceedings	56
Appendix "C", Reproduction of Exhibit 27 in the Commission's proceedings	57

CASES CITED.

	PAGE
Absorption of Loading Charge (1930), 161 I. C. C. 389	44
Alabama v. United States, 283 U. S. 776	30
Allowance for Driving Horses at Miles City, Mont. (1938), 227 I. C. C. 387	44
Alton & S. R. Co. v. Illinois Commerce Commission (1925), 316 Ill. 625, 147 N. E. 417	34
Atchison, T. & S. F. Ry. Co. v. United States, 279 U. S. 768	45
Atchison, T. & S. F. Ry. Co. v. United States, 295 U. S. 193	30
Baltimore & O. R. Co. v. United States, 298 U. S. 349	30
Birkett Mills v. D., L. & W. R. R. Co. (1927), 123 I. C. C. 63	39
Boxes or Cartons, Indiana and Michigan to W. T. L. Points (1937), 222 I. C. C. 91	33
Bos Sand Co. v. A., T. & S. F. Ry. Co. (1926), 112 I. C. C. 121	34
Burge-Doyle Live Stock Co. v. A. E. R. R. Co. (1924), 87 I. C. C. 319	34
Cattle Raisers' Asso. of Tex. v. M., K. & T. Ry. Co., et al. (1908), 13 I. C. C. 418	33
Central Railroad Co. of New Jersey v. United States, 257 U. S. 247	42, 45, 47
Consolidated Cottonseed Co. v. Arkansas & M. Ry. B. & T. Co. (1932), 182 I. C. C. 12	33
Cotton from and to Points in Southwest and Memphis (1935), 208 I. C. C. 677	12, 15, 16
Cotton Loading Provisions in the Southwest, I. & S. 4276 (1937), 220 I. C. C. 702	8

Drayage Absorptions by S. W. M. R. R. Co. (1926), 113 I. C. C. 179.....	44
Florida v. United States, 292 U. S. 1.....	30
Gallagher v. Pennsylvania R. Co. (1929), 160 I. C. C. 563	39
Georgia Pub. Serv. Commission v. United States, 283 U. S. 765.....	30
Interstate Commerce Commission v. Alabama M. R. Co., 168 U. S. 144.....	44; 46
Interstate Commerce Commission v. B. & O. R. Co., 145 U. S. 263.....	36
Interstate Commerce Commission v. B. & O. R. R. Co., 225 U. S. 326.....	40, 44
Interstate Commerce Commission v. Clyde Steamship Co., 181 U. S. 29.....	35
Interstate Commerce Commission v. Delaware, L. & W. R. Co., 220 U. S. 235.....	37, 40, 44
Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42.....	36
Interstate Commerce Commission v. Stickney, 215 U. S. 98	42, 45, 47
Interstate Commerce Commission v. Union P. R. Co., 222 U. S. 541.....	34
Loading and Unloading Carload Freight (1925), 101 I. C. C. 394.....	7
McCormick Warehouse Co. v. Pennsylvania R. Co. (1928), 148 I. C. C. 299.....	7
Magee Carpet Co. v. C. R. R. Co. of N. J. (1928), 144 I. C. C. 281.....	33
Mayer & Co. v. C., M. & St. P. Ry. Co. (1922), 69 I. C. C. 519.....	34

Merchants Warehouse Co. v. United States, 283 U. S.	
501	39
Mitchell v. United States, 313 U. S. 80.....	32, 36
Montana Horse Products Co. v. Atchison, T. & S. F.	
Ry. Co. (1934), 203 I. C. C. 681.....	33
Mutual Coal, Light & Power Co. v. A., T. & S. F. Ry.	
Co. (1934), 205 I. C. C. 243.....	34
Nebraska Seed Co. v. Director General (1921), 64	
I. C. C. 75.....	34
Phipps v. N. & W. R. Co., 2 Q. B. 229.....	46
R. R. Commission of Geo. v. Clyde Steamship Co.,	
et al. (1892), 5 I. C. C. 324 (4 I. C. R. 120)...	25, 33, 38
Seaboard Air Line Railway Co. v. United States, 254	
U. S. 47.....	44
Smith & Co. v. Chicago & A. R. Co. (1931), 171 I. C.	
C. 605	34
United States v. Carolina Freight Carriers Corpora-	
tion, 315 U. S. 475.....	26
United States v. Chicago, M., St. P. & P. R. Co., 294	
U. S. 499.....	26
United States v. Illinois C. R. Co., 263 U. S. 515....	34
United States v. Louisiana, 290 U. S. 70.....	30
Wight v. United States, 167 U. S. 512.....	39, 44

STATUTES.

PAGE

Interstate Commerce Act, Part I:

Section 1(3)(a)	40
Section 1(5)(a)	4, 41, 42
Section 2	4, 15, 22,
24, 25, 26, 27, 28, 30, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46	
Section 3(1)	4, 15, 22, 24, 25, 26, 27, 28, 30, 41, 44, 46, 47
Section 6(1)	3, 40
Section 15(1)	3
Section 15(7)	3, 25

Urgent Deficiencies Act of Oct. 22, 1913.....	2
---	---

Elkins Act (Title 49, U. S. C. Sec. 41-43).....	40
---	----

English Statutes:

Equality Clause, Section 90 of the Railway Clauses Consolidation Act of 1843, 8 & 9, Vict., ch. 20	37
Section 2 of the Act of July 10, 1854, 17 and 18 Vict. c. 31.....	46
Section 11 of the Act of July 21, 1873, 36 and 37 Vict. c. 48.....	46

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 520

L. T. BARRINGER AND COMPANY,
Appellant,
vs.

UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION, THE ATCHISON,
TOPEKA AND SANTA FE RAILWAY COM-
PANY, *et al.*,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TENNESSEE.

BRIEF ON BEHALF OF APPELLANT

OPINION BELOW

The report of the Interstate Commerce Commission, Division 3, in *Investigation and Suspension Docket No. 4981, Loading Cotton in Oklahoma* (R. 13-34) appears in 248 I. C. C. 643. The *per curiam* opinion of the specially constituted District Court, accompanied by its findings of fact and conclusions of law, is found in the record at pages 78 to 85, but is not reported.

JURISDICTION

The final decree of the District Court was entered on August 17, 1942, (R. 85). Petition for appeal (R. 87) was filed and allowed on October 7, 1942. (R. 93) Probable jurisdiction was noted by this Court on December 7, 1942. (R. 294) The jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913 (Title 28, U.S.C., Secs. 47 and 47a) and Sec. 238 of the Judicial Code as amended by the Act of February 13, 1925 (Title 28, U.S.C., Sec. 345).

QUESTIONS PRESENTED

The Interstate Commerce Commission, by order entered after full hearing in an investigation and suspension proceeding, approved as not unlawful a proposed change in the tariff charges for the loading of cotton at stations in Oklahoma served by the railroad appellees. The proposed change eliminated an existing charge for loading cotton by the railroad appellees at first origin, provided such cotton is subsequently reshipped under transit on carload rates to the Texas ports, the existing charge being continued on the same cotton loaded at the same first origin if subsequently reshipped under transit on carload rates to the Southeast. (See map at back of this brief.) The ultimate question is as to the validity of that order. Subordinate questions are:

(1) Whether the order of the Commission is supported by findings sufficient to disclose the basic facts on which the Commission acted and sufficient to disclose a correct application of statutory standards;

(2) Whether the order and findings of the Commission are supported by the evidence;

(3) Whether the Commission acted upon considerations authorized by the statute.

THE STATUTES INVOLVED

The provisions of Part I of the Interstate Commerce Act (Title 49, U.S.C., Secs. 1-27), under which the case before the Commission arose and was decided are reproduced in full in Appendix "A" hereto. The pertinent provisions thereof may be summarized as follows:

The procedure. Section 15(7) authorizes the Commission, either upon complaint or upon its own initiative without complaint, to suspend for a period of seven months any schedule stating a new rate, charge, regulation, or practice affecting any rate or charge, and to enter upon a hearing as to the lawfulness thereof. After the full hearing, the Commission is authorized to make such order with reference thereto as would be proper in a proceeding initiated after the new schedule had become effective. The burden of proof is imposed upon the carriers proposing the change to show that it is just and reasonable.

The Commission's authority. Section 15(1) authorizes the Commission to enter orders to effectuate the standards of lawfulness provided by the Act. If the Commission finds a violation of such standards, its order may either prescribe maximum or minimum lawful rates and charges and just and fair regulations, or may require carriers to cease and desist from maintaining rates, charges, regulations, etc., which are, or will be, in violation of the Act to the extent found by the Commission.

The tariffs. Section 6(1) requires the publication and filing of schedules showing all rates, fares, charges, regulations, etc. Such schedules "shall also state separately all terminal charges, . . . all privileges or facilities granted or allowed and any rules or regulations

which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered. * * *."

The standards of lawfulness. Section 1(5)(a) provides that "All charges made for any service rendered or to be rendered * * * shall be just and reasonable" and prohibits "every unjust and unreasonable charge for such service or any part thereof."

Section 2 prohibits unjust discrimination as between shippers, which is defined as the collection from one person of a greater compensation "for any service rendered, or to be rendered, in the transportation of property" than is collected from another person for doing for him "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions."

Section 3(1) declares that it shall be unlawful for any common carrier to give any undue or unreasonable preference to any person, locality, or traffic in any respect whatsoever or to subject any particular person, locality, or traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

STATEMENT OF THE CASE

I. PROCEEDINGS IN THE DISTRICT COURT

The appellant buys cotton in the State of Oklahoma, which it ships to domestic mills in the Southeast. The cotton so shipped is sold on the basis of prices delivered at destination, and appellant pays all rates and charges which accrue on said shipments. (R. 260; 279) This cotton is purchased by appellant in competition with cotton merchants who purchase cotton at the same points for shipment to the Texas ports. (R. 259-62; 279-280; 283-4)

The appellant filed its amended complaint in the District Court (R. 1-54; 71) to enjoin and set aside the operation and effect of an order of the Interstate Commerce Commission, Division 3, in *Investigation and Suspension Docket No. 4981, Loading Cotton in Oklahoma*, 248 I. C. C. 643, issued on January 29, 1942, to become effective, as postponed from time to time, on April 21, 1942. The United States of America and the Interstate Commerce Commission were named as defendants. (R. 1)

The Atchison, Topeka and Santa Fe Railway Company and other lines operating from Oklahoma to the Gulf,¹ which were respondents in the proceeding before the Commission, were permitted to intervene as parties defendant. (R. 65)

On July 17, 1942, the District Court rendered a *per curiam* opinion (R. 85) accompanied by its findings of fact and conclusions of law (R. 78-84), in which it found that the order of the Commission was supported by essential findings and by the evidence, and that the Commission did not

¹ These additional lines are Gulf, Colorado and Santa Fe Railway Company, Panhandle and Santa Fe Railway Company, Missouri-Kansas-Texas Railroad Company, and The Kansas City Southern Railway Company. The Oklahoma Railway Company was a respondent before the Commission but did not intervene in the court below.

base its order on matters which it was not legally entitled to consider. The final decree dismissing the complaint was entered on August 17, 1942. (R. 85) From that decree, a direct appeal was taken to this Court.

II. PROCEEDINGS BEFORE THE COMMISSION

A. THE PROPOSED CHANGE

While this case involves only a change in separately established charges for a loading service, it will be helpful to clear understanding to describe the rate structure and the movement of cotton thereunder as described in the evidence, in the report of the Commission, and in the findings of the District Court. (R. 78-9)

Prior to August 7, 1933, cotton transported from Oklahoma, as well as from other states, to destinations all throughout the United States, moved on any-quantity rates. By the term "any-quantity" is meant that the same rate applied regardless of the number of bales offered for shipment. Since these rates were of a less-than-carload character, the line-haul rates included the service of loading the cotton into cars at the original shipping point. (R. 111; 15; 248 I. C. C. 644)² This was consistent with the general practice under less-than-carload rates.

On August 7, 1933, the Southwestern carriers established a system of carload rates³ on cotton, substantially below

² Record references from 14 to 34 inclusive, are to the report of the Commission as contained in the printed record. In connection with each such reference, the volume and page of the Commission's print of its report are also given. Record references from 105 to 277 inclusive, are to the evidence introduced before the Commission.

³ The application of carload rates is conditioned on a specified minimum quantity being tendered by the shipper to the carrier in a single shipment. The carload minima covering the carload rates on cotton from Oklahoma are 25,000, 50,000 and 60,000 pounds to the Texas ports and 25,000, 35,000, and 50,000 pounds to destinations in southeastern and eastern territories. Each of these minima governed different rates, the rates varying inversely with the minima, although not in proportion. (R. 219)

the any-quantity basis, for the purpose of meeting truck competition. (R. 18; 248 I. C. C. 646). Ordinarily, goods which move on carload rates are not loaded by the carriers. The general rule governing such loading, as provided in the Consolidated Freight Classification, is shown on Exhibit 21 in the proceedings before the Commission (introduced at R. 220), and reads as follows (*italics ours*):

"RULE 27

LOADING OR UNLOADING

"Section 1. Owners are required to load into or on cars freight for forwarding by rail carriers, and to unload from cars freight received by rail carriers, carried at CL ratings or rates, *except where tariff of carrier at point of origin or destination or stopover station (as the case may be) provides for loading or unloading of CL freight by carrier.*"⁵

Accordingly, the new carload rates did not cover a loading service to be performed by the railroad. Therefore, the railroad appellees and all other Oklahoma lines published a special provision for the loading of cotton moving on carload rates, under which the railroad serving the origin would load the cotton, if requested by the shipper, for a charge of 5½ cents per square bale and 2½ cents per

⁵A certified copy of the full transcript of the record before the Interstate Commerce Commission, including the oral testimony and the documentary exhibits, was received in evidence by the District Court as Plaintiff's Exhibit 2. (R. 73) The oral testimony contained in that transcript is shown on pages 195 to 278 of the printed record. By stipulation, the exhibits contained in the Commission's record have been omitted in the printing with leave to the parties and to this Court to refer thereto. (R. 293) When such exhibits are referred to herein, the pertinent portions thereof will be reproduced.

⁶In *Loading and Unloading Carload Freight* (July 20, 1925), 101 I. C. C. 394, at page 396, the Commission said:

"The general rule in the United States is and long has been that shippers are required to load, and receivers to unload, carload freight. This rule is embodied in the consolidated classification, and applies generally throughout the country."

A similar statement is found in *McCormick Warehouse Co. v. Pennsylvania R. Co.* (November 22, 1928), 148 I. C. C. 299, 306, and in many other cases.

round bale.⁶ (R. 115) These provisions are shown on Exhibit 27 before the Commission (Introduced at R. 253) which is reproduced in Appendix "C" hereto. The items there shown under the heading "PRESENT READING" show the rule as applied for the account of all railroads in the State of Oklahoma at the time the case before the Commission started.

The cotton subject to these loading charges is uncompressed and is rarely, if ever, transported in a direct movement from a country origin to final destination. (R. 203; 227-8) Rather, it is initially shipped in small quantities from country stations (gin points) to compresses at concentration stations. Subsequently, after compression and assembly into merchantable lots, the cotton is reshipped in a carload quantity. (R. 15; 248 I. C. C. 644)

At the time of the initial shipment from gin to compress, the railroads assess certain local or transit rates, sometimes referred to as "float-in" rates. Later, when the carload reshipment is made, the railroads collect the full local carload rate from the compress point to final destination. Subsequently, the shipper files a claim with the carriers and the aggregate inbound and outbound charges so paid are readjusted to the basis of the *through* carload rate from gin origin to final destination via the transit station. (R. 113-4 (par. C); 15; 248 I. C. C. 644) The map at the back of this brief shows a typical country origin and transit point as well as representative routes therefrom to the Southeast and the Texas ports.

Pursuant to the approval of the Commission granted in *I. & S. 4276, Cotton Loading Provisions in the Southwest* (April 6, 1937), 220 I. C. C. 702, the loading charge may be paid at the gin origin at the time the service is per-

⁶ A square bale of cotton weighs approximately 535 pounds and a round bale half that amount. (R. 141)

formed, or, if not paid then, it follows the shipment and is collected at the time of the settlement of the shipper's transit claim. (R. 183-4) In the case last cited, the Commission noted (pp. 707-8) that "the carload rate * * * does not contemplate free loading," and found that "there is no doubt about the propriety of the carrier exacting compensation for the loading it performs." Subsequent to the case cited, practically no loading charges are paid at the country origin (R. 184); rather, they are collected at the time the transit claim is settled.

The purchaser of the cotton at the transit point, who re-ships under transit on the carload rates obtains his information as to whether the cotton was loaded by the railroad at the country origin, so as to make the charge applicable, from an appropriate notation on the inbound bill of lading and expense bill. (R. 184; 261)

The tariff rule governing the loading of cotton is carried in the tariff which publishes the through carload rates and also in the tariff which provides the transit privilege. The reason for this duplicate publication was explained by the railroad appellees as follows: The transit tariff provides the inbound rates from the country stations to the compress or the warehouse stations, and the rule is published in that tariff in order to make clear the application thereof in connection with such inbound rates. The carload rate tariff is subject to a general rule that cotton moving thereunder must be loaded by shippers. In order to make proper provision for loading by the railroad instead of by the shipper, it is necessary to publish the rule in the carload rate tariff. (R. 135)

As the District Court found (R. 78), the loading charge is maintained and assessed by the individual railroad which performs the loading service.

The proposed change involved in the case before the Commission consisted of inserting an exception to the existing rules in the rate tariff and in the transit tariff. That exception, as shown under the heading "PROPOSED READING," in Exhibit 27 reproduced in Appendix "C" hereto, provides that at points in Oklahoma on the lines of the railroad appellees, cotton tendered to a railroad appellee at its depot or cotton platform will be loaded without charge to the shipper, but *only* in the case of shipments to Beaumont, Corpus Christi, Galveston, Houston, Orange, Port Arthur, or Texas City, Texas, or Lake Charles, La. (See map at back of brief)

This change was confined to cotton handled on carload rates. There are still some through movements under the less-than-carload rates. (R. 111-2) As stated, those rates include the loading service to all destinations.

The proposal did not extend to free loading at a compress facility. (R. 122-3) The loading service covered by both the original rules and the amended rules takes place at the gin origin at the inception of the "float-in" movement. At that time, neither the shipper nor the carrier has any knowledge of the particular destinations to which the cotton will be reshipped after concentration at the transit point. While the inbound "float-in" rates to the transit point are paid at the time the "float-in" services are rendered, since these rates are the same on all cotton regardless of ultimate destination (R. 135-6), the application of the loading charge under the amended rule cannot be finally determined until the reshipment in a carload quantity is made from the transit point and the ultimate destination is known. Consequently, at the time cotton is loaded by one of the railroad appellees under the amended rule, neither the railroad nor the shipper knows whether or not the loading charge will ultimately be demanded.

B. THE SUSPENSION AND INVESTIGATION PROCEEDINGS

Upon the written protest of the appellant (R. 103-4) and others, the Commission entered an order on June 11, 1941 (R. 11-12), which postponed the effective date of the proposed change until January 11, 1942, and instituted an investigation into the lawfulness thereof.⁷ Subsequently, the respondents before the Commission deferred the effective date until the proceedings before the Commission could be concluded. (R. 15; 248 I. C. C. 644)

As stated by the principal witness for the respondents, "the suspended rule has to do only with the terminal service of loading cotton." (R. 111)

The case followed the course of a full hearing (R. 106),⁸ briefs, proposed report, exceptions, oral argument, report and order by the Commission, Division 3 (R. 13-34; 248 I. C. C. 643-655), petition of appellant for reconsideration (R. 35), a denial of that petition and a final order discontinuing the proceeding as of April 21, 1942. (R. 6)

The proponents of the proposed change included the railroads, for whose account it was published, who were the sole respondents before the Commission, the United States Department of Agriculture, and the Corporation Commission of Oklahoma. The protestants included the appellant, which complained because shipments to the Southeast were not treated equally with those to the Texas ports under the proposed rule; the New Orleans Joint Traffic Bureau, which was concerned with discrim-

⁷ The proceedings before the Commission also involved *Investigation and Suspension Docket No. 4996, Loading Cotton on St. Louis, San-Francisco & Texas Railway Company in Texas*, instituted by order of July 23, 1941, which was heard and decided with *I. & S. Docket No. 4981*. (R. 1415; 248 I. C. C. 644) *I. & S. 4996* involved a proposal of the respondent therein to reestablish a loading charge in Texas. That case does not bear upon any of the issues involved in the instant case and will not be further considered herein.

ination against cotton shipped to New Orleans; the Mississippi Valley Interior Cotton Compress & Cotton Warehouse Association, which originally took a position similar to that of appellant, but later opposed any free loading whatsoever as an unreasonable practice (R. 27-28; 248 I. C. C. 651-2); and other railroads⁸ which opposed the partial elimination of the unloading charge in Oklahoma for fear that free loading would spread into other cotton producing states. (R. 30; 248 I. C. C. 653)

C. THE CONTENTIONS OF THE RAILROAD PROPONENTS

The railroad proponents of the proposed change, appellees here, relied on the following matters as justifying the reasonableness of the proposed elimination of the loading charge on cotton-reshipped to the Texas ports:

(1) The loading charge in Texas had been previously eliminated in order to meet truck competition, and some carriers believed that a prior order of the Commission⁹ required the same loading privileges on Oklahoma cotton as on Texas cotton (R. 17; 248 I. C. C. 645); (2) the loading charge was considered a nuisance by shippers and was responsible for diversion of the tonnage to trucks (R. 116-7; 126), particularly as to cotton going from country origin to transit point (R. 128); and (3) the elimination of the loading charge would be helpful in meeting truck competition. (R. 17; 248 I. C. C. 645) The principal witness for the respondents before the Commission stated that the main purpose of the proposal was to stop the trucking of

⁸ These include Guy A. Thompson, Trustee, Missouri Pacific Railway Company; J. M. Kurn and John G. Lonsdale, Trustees, St. Louis-San Francisco Railway Company; St. Louis, San Francisco and Texas Railway Company; Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees, The Chicago, Rock Island and Pacific Railway Company; and St. Louis Southwestern Railway Company.

⁹ Finding No. 8, in *Cotton from and to Points in Southwest and Memphis*, (May 8, 1935), 208 I. C. C. 677, 732.

cotton from country stations to compress (transit) points¹⁰ (R. 123-4), an excerpt from his testimony being quoted in the margin.

To excuse the difference in the proposed treatment of cotton shipped to the Texas ports, on the one hand, and cotton shipped to the Southeast, on the other, the respondents relied upon the following matters: (1) Other railroads objected to the elimination of the loading charge on cotton shipped to the Southeast which originated on the lines of respondents because of fear that the free loading would spread into Arkansas (R. 23; 248 I. C. C. 649); (2) there is no truck movement of cotton from Oklahoma to the Southeast (R. 23; 248 I. C. C. 649); and (3) the line-haul rates to the Southeast are lower relatively than to the Texas ports, (R. 23, 24; 248 I. C. C. 649).

D. THE CONTENTIONS OF APPELLANT

Appellant was not opposed to the elimination of the loading charge, provided all shippers, traffic, and localities were treated equally. That equality could be obtained either by the complete elimination of the charge or by applying a uniform charge on all cotton loaded at the shipper's

¹⁰ In the following excerpt from the testimony we have made some slight changes in punctuation and have added the italics:

"Examiner Archer: * * * If this elimination of the loading charge is not going to have any effect at the compress points, I want to know that or want to get it clear in the record as to what effect it is going to have.

"The Witness: We can't stop right there, Mr. Examiner, because, in connection with cotton we give transit privileges and protect the through rate from the local gin origin to your final destination where we concentrate the cotton at the compress. In other words, as to the outbound movement, he can get his charges that he has paid into the compress refunded by filing a claim and retain protection on a through rate from point of origin; and every rate or rule or regulation which we can make available to the shipper * * * will encourage him to give us his cotton at the origin station, let us haul it into the compress point and then on out to destination. We will have a freight bill behind the cotton when it comes into the compress point which is of value to him to get a refund, and that is what we want to do, and stop the trucking into the compress points as much as possible.

"Mr. Belnap: Is that the main purpose of this proposal?

"The Witness: Yes; * * *."

request. Appellant's contentions were directed solely to the question of unjust discrimination and undue prejudice. It urged that the respondents had failed to show a dissimilarity in circumstances and conditions sufficient in fact or in law to remove the proposal from the statutory prohibitions against unjust discrimination and undue prejudice. Particularly, appellant contended:

(1) The free loading in Texas afforded no reason for the disparity, since free loading in Texas was not confined to cotton reshipped to the Texas ports but applied equally to the cotton reshipped to the Southeast. (R. 162; 168)

(2) The opposition of other railroads did not relieve the railroad appellees from the duty of treating all shippers equally, since the loading service and charge therefor is wholly local to such appellees and entirely within their control.

(3) The acute truck competition is in connection with the move from gin origin to compress point (R. 117, 126, 128); such competition is the same in the case of cotton subsequently reshipped to the Southeast as in the case of cotton subsequently reshipped to the Texas ports (R. 137); consequently, there is no dissimilarity in competitive conditions as a matter of fact. This is recognized by the "float-in" from the place of loading to the transit station, since identical "float-in" rates are provided on cotton which may be subsequently reshipped under transit to the Southeast as on cotton which may be subsequently reshipped under transit to the Texas ports. (R. 135-6)

(4) There was no evidence as to relative rate levels other than a mere statement of rates and distances¹¹ (Exhibits 32 to 39, inclusive, introduced at R. 274). Such evidence proves nothing when unaccompanied by proof as to

¹¹ Exhibit 38, which is typical of this evidence, is reproduced in Appendix B hereto.

relative operating conditions, relative costs of transportation, etc. In a prior proceeding on a comprehensive record, *Cotton from and to Ports in Southwest and Memphis* (May 8, 1935), 208 I. C. C. 677, 717-719, the Commission held that the carload rates to the Southeast were not too low as compared with the rates to the Texas ports, the rate relation being at that time more favorable to the Southeast than at the time of the instant case.¹²

(5) The physical service for which the charge is assessed on cotton reshipped to the Southeast is identical with the physical service performed without charge if the cotton is reshipped to the Texas ports. In either case the work is performed by the station forces or section crews of the respondents (railroad appellees). (R. 24; 248 I. C. C. 649) The services being identical, Section 2 prohibits a difference in charges.

(6) As a matter of law, differences in the matter of relative line-haul rate levels cannot excuse the apparent violations of Sections 2 and 3(1), and differences in the matter of truck competition cannot excuse the apparent violation of Section 2. (See appellant's petition for reconsideration.) (R. 48-53)

(7) The difference in loading charges would constitute a serious disadvantage to appellant in buying and shipping cotton to the Southeast in competition with merchants who ship to the Texas ports. (R. 259-262)

¹² In the prior case (1935), representative rates approved as not improperly related were shown from Oklahoma City to Houston, Texas, as 44 cents, minimum 75,000 pounds; 50 cents, minimum 50,000 pounds; 58 cents, minimum 25,000 pounds; and to Columbia, S. C., as 67 cents, minimum 50,000 pounds; 73 cents, minimum 35,000 pounds; and 82 cents, minimum 25,000 pounds. Exhibit 38 in the instant case before the Commission (reproduced in Appendix "B" hereto) shows the present rates to Columbia are the same as the rates in 1935, but the present rates to Houston are on a lower basis, i. e., 40 cents, minimum 65,000 pounds; 46 cents, minimum 50,000 pounds; and 54 cents, minimum 25,000 pounds.

E. THE REPORT OF THE COMMISSION, DIVISION 3

1. Recitals as to the contentions of the proponents

The report of the Commission deals with many general matters which have no pertinency to the issues presented in this appeal. Consequently, we confine the following summary of the report to those matters which this Court must consider in passing upon the questions of law presented.

The report notes that in a prior proceeding decided in 1935, referred to as the *Southwestern Cotton* case,¹³ the Commission entered Finding No. 8 (R. 17; 248 I. C. C. 645), which required an equality of carload rates, distance considered, from all southwestern origins to Lake Charles, and to the Texas ports. In 1939, free loading was provided at Texas origins in order to meet truck competition. Regarding this situation, the report states (R. 17; 248 I. C. C. 645):

"* * * Respondents claim that they are also confronted with motortruck competition, and by eliminating the loading charge in Oklahoma they can to some extent meet this competition and at the same time comply with the intended effect of finding 8 in the *Southwestern Cotton* case."

And (R. 18; 248 I. C. C. 646):

"* * * The territorial application as to destinations on traffic originating in Oklahoma, however, is not as large as the rule applicable in Texas, the Oklahoma rule applying only to Lake Charles, La., and the Texas ports."

As to the proof offered by the respondents relating to truck competition, the report states (R. 22-23; 248 I. C. C. 648-9):

"* * * Reductions in through rates for the purpose of more adequately meeting truck competition were

¹³ *Cotton from and to Points in Southwest and Memphis* (1935), 208 I. C. C. 677.

made applicable from the Southwest, including Oklahoma, on June 20, 1940, but the charge for loading in carload lots still annoyed the Oklahoma shippers, who continued to increase their deliveries to trucks throughout 1940. In 25 counties within the State of Oklahoma served by the Santa Fe for the season August 1, 1939, to July 31, 1940, there were 207,863 bales of cotton ginned. For this period, there were handled to compress points by the Santa Fe 27,758 bales and through from gin points to an interstate destination 18,179 bales, or a total of 45,937 bales, which is but 22.1 percent of the bales of cotton ginned. The balance of the cotton, 77.9 percent, was either handled by motortrucks or by other rail carriers. For the season August 1, 1940, to June 30, 1941, the latest for which data are available, there were 312,514 bales of cotton ginned in the same counties. The Santa Fe handled to compress stations 47,522 bales, and through from gin points to interstate destinations 15,352 bales, or a total of 62,847 bales, which is but 20.1 percent of the bales ginned. The remainder, 79.9 percent, was handled by motortrucks or by competing rail carriers.

"During the season 1939-40, there were 22,163 bales of cotton moved by motortruck from compress stations in Oklahoma. For the same period and from these same compress points the Santa Fe handled but 21,179 bales."

The reasons advanced by the respondents for not treating the Southeast the same as the Texas ports were summarized in the report, as follows (R. 23-24; 248 I. C. C. 649-50):

"The rule under suspension is restricted as to territorial application because of opposition of other lines. The reason for not providing for the absorption of the loading charge in Oklahoma on traffic destined to the Southeast is that the rates to the Southeast are already lower relatively than they are to the Texas ports. Besides, there is no trucking of cotton from Oklahoma to Memphis or to the Southeast. The average cost for complete loading by the rail carriers

would be a fraction less than 4 cents a bale, and this cost where labor is hired specifically for that purpose. Under present conditions the expense would be nominal, as the loading is accomplished by the local stations forces. In the case of a nonagency station, section crews are used. Respondents further point out that, when they perform the loading, the cars are loaded to their maximum capacity, resulting in decreased operating expense by eliminating car depreciation and switching and other expenses incidental to the handling of cars in the transportation of cotton. In the *Southwestern Cotton* case at page 691 it stated:

“What the railroads are, or should be, seeking is to engage in the transportation of cotton under an arrangement which will net them the greatest possible revenue out of the depressed rates which the competition compels them to charge.”

“The competition with trucks in Texas was found to be greater to the Gulf ports than from Oklahoma points to the Gulf ports, but the competition with trucks at the country stations to the compress points is shown to be proportionately keen in both States. Regardless, however, of the fact that the rates to the Southeast are relatively lower than to the Texas Gulf ports, respondents stand ready to make the same free loading rule applicable from Oklahoma to such southeastern destinations. In the *Southwestern Cotton* case at page 718 it is stated:

“It is conceded that the rates to southern mill points from Oklahoma are graded up very slowly as the distance increases, but such gradation is asserted to be necessary in order to prevent the cotton from being trucked to Arkansas compress points or river landings.”

2. Recitals as to the contentions of the appellant

The report mentions appellant in its first paragraph as one of those protesting the proposed change. Thereafter, the report of the majority makes no mention whatsoever of appellant, of its interest in the case, of the contentions advanced by it, or of the evidence offered on its

behalf. In the dissenting opinion of Commissioner Johnson, the following is said (R. 32-33; 248 I. C. C. 654-5):

"I disagree with the views of the majority. In my opinion, cancelation of the loading charges at Oklahoma points by the respondents in I. and S. No. 4981 will result in preference of the Texas Gulf ports, Lake Charles, La., and west, and prejudice to New Orleans, La., Memphis, Tenn., and points in the Southeast. Although the report does not indicate that there is compelling truck competition to New Orleans, Memphis, and the Southeast, it does indicate that the largest truck movement in Oklahoma is from country points to the compress points. As it does not appear that trucks are hauling cotton from the compress points to New Orleans, Memphis, and the Southeast, it may be argued that the circumstances and conditions surrounding the transportation to those points are different from those governing the transportation to the Texas Gulf ports. However, the truck competition between the country points and the compress points is the same regardless of the destination of the cotton after compression. This being true, how can it be said that the purchaser of cotton at Memphis, for example, is at no disadvantage? Cotton is purchased at or near Muskogee, Okla., for L. T. Barringer & Company, of Memphis, for shipment to Kankakee, N. C., in competition with those who purchase for shipment to the Texas Gulf ports. The cotton purchased for Barringer includes the loading charge, whereas that purchased for movement to the Texas Gulf ports will not. It is said that a difference in 5 cents a bale will make or lose a sale."

3. The findings of the Commission as to the pertinent facts

After reciting the contentions of the parties, other than the appellant, and summarizing the evidentiary facts relied upon by them, the report concludes with a statement of fact which is introduced by a phrase indicating that the Commission considered such facts to be controlling

upon the issues, that statement reading (R. 30-31; 248 I. C. C. 653-4):

"The pertinent facts are these: The carload rates on cotton from Oklahoma to the Gulf ports and the Southeast are conceded by all parties to be below a reasonable maximum level, yet at the same time compensatory. This is affirmed in the *Southwestern Cotton case*. Some carriers feel that they must do something to retain the cotton traffic on their lines. They are using the free-loading rule to assist them in retaining such traffic, and at the same time they are attempting to derive as much revenue as they can from the admittedly low level of rates now in effect on this traffic.

"The main concern of the carrier protestants is to prevent the spread of the free-loading rule, but we believe there has not been sufficient time to test the feasibility of this rule. Therefore, its adoption or rejection may be left to the discretion of all the carriers. The St. Louis, San Francisco & Texas Railway, respondent in I. and S. No. 4996, should have the same right to assess the loading charge on shipments of cotton originating on its lines in Texas as some of the Oklahoma carriers have who are not adopting the free-loading rule. The rates from the Texas origins are also upon a depressed level, and any of the rail carriers has the right to offset this discrepancy by any legitimate means. Evidently some believe the rule will be helpful while others do not. Some of the carriers in Oklahoma do not desire to waive the loading charge, and the same right of choosing one method or the other cannot be denied any of the Texas or Oklahoma carriers so long as there is no violation of the act in either State.

"In the *Southwestern Cotton case* the Commission, at page 724, said:

"The practices which may have prevailed in the past with respect to free transit are no criteria in the present circumstances. In the past there was substantially no unregulated competition and the rates were not depressed. If the carriers gave a free service in one instance it was not unrea-

sonable to expect them to give it in another. Now the situation has changed. In the present circumstances it is not only the carriers' right but their duty to conduct their operations in the most economical manner possible, in order to retain the greatest net revenue out of the low competitive rates which they are compelled to charge. The fact that they have provided certain transit services without charge in addition to the transportation rates, in instances where that seems to be good business policy from a competitive standpoint, affords no basis for requiring them to assume the additional burden and expense incident to such services where the opportunities for corresponding benefits to them are lacking.

"This was said with reference to the circumstances which distinguish the granting of transit in the interior but not at the ports. It applies with equal force to either of the situations presented in the proceedings now before us.

"We therefore find that the elimination of the rail carriers' loading charge on cotton originating in Oklahoma on respondents' lines, compressed in transit, and moving from compress point to Texas Gulf ports and Lake Charles, La., at the carload rate from origin point, is just and reasonable and not shown to be otherwise unlawful."

4. The order of the Commission

Contemporaneous with its report, the Commission entered an order, of which the report was made a part, discontinuing the proceeding as of February 21, 1942. (R. 33) Before that order became effective, appellant filed with the Commission its petition for reconsideration which is reproduced in the record. (R. 35) That petition was denied by order of the entire Commission, dated April 13, 1942. (R. 6) As postponed from time to time, the order of Division 3 became effective April 21, 1942 and the railroad appellees made effective the change as authorized by the report and order on that date. (R. 6)

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred—

(1) In entering a general finding in which it adopted as its own the findings of fact of the Commission without specification of the language of the Commission considered by the court to constitute findings of fact;

(2) In concluding as a matter of law that the Commission made essential basic findings of fact in its report, and in failing to enjoin the order of the Commission on the ground that it is not supported by findings sufficient to disclose either the basic facts on which the Commission acted or a correct application of statutory standards;

(3) In concluding as a matter of law that the findings entered by the Commission are adequately supported by substantial evidence, and in failing to enjoin the order of the Commission on the ground that it is not supported by the evidence;

(4) In concluding as a matter of law that the Commission had the right to consider the dissimilarity in circumstances and conditions between the line-haul movement of cotton from Oklahoma origins to the Southeast and the line-haul movement of cotton from Oklahoma origins to the Gulf ports in determining whether the tariffs under investigation would result in violations of Sections 2 and 3(1) of the Interstate Commerce Act;

(5) In failing to enjoin the order of the Commission on the ground that its ultimate conclusion was predicated on circumstances which it was not legally entitled to consider as excusing the difference in charges complained of by appellant under Sections 2 and 3(1).

SUMMARY OF ARGUMENT

The loading charges and services at the Oklahoma stations here involved are within the sole control of the railroad appellees. These loading services are identical, regardless of the destination to which the cotton may be reshipped subsequent to the loading and subsequent to the initial haul from first origin to the transit (concentration) point. Appellant, a shipper of cotton to the Southeast, claims a right under the Interstate Commerce Act to equality of treatment as to such charges. That right to equal treatment is denied it by the order of the Commission.

The railroad appellees seek to excuse this inequality of treatment on the ground that (1) there is a difference in the matter of truck competition to the Southeast, as compared with truck competition to the Texas ports; and (2) the line-haul carload rates, applied under transit to the Southeast, are not as high as they should be in comparison with the line-haul rates applied under transit to the Texas ports.

While the Commission notes that these are the contentions of the appellees, its report neither contains any clear finding that such differences exist, nor does the report predicate the order on the existence of such differences.

Furthermore, there was no evidence tending to show that such differences existed as a fact.

Even if the report contained adequate findings supported by the evidence as to these matters, the order should nevertheless have been enjoined because, in that situation, it would be based on considerations which have no relevancy to the issues and upon standards which are not authorized by the statute.

The issue before the Commission was restricted to the

lawfulness of a difference in separately stated charges for identical loading services on like traffic. In such a case, Section 2 applies even though the destinations to which the cotton may be later reshipped after concentration-in-transit are different. Complete similarity as to all services received is not required in order to make Section 2 applicable to a case which involves only the separately stated charges for the loading services.

The alleged difference in the matter of truck competition and the alleged difference in the matter of the relative levels of line-haul rates do not constitute circumstances and conditions entitled to consideration upon the question of whether Section 2 prohibits a difference in separately stated charges for identical loading services. Consequently, an order predicated on such differences is beyond the authority of the Commission to make.

As to the issue under Section 3(1), the Commission had no right to conclude that a prejudicial difference in the matter of separately stated loading charges was not undue because the shipper so prejudiced enjoyed a relatively lower level of rates for line-haul transportation to the Southeast than was enjoyed by his competitors shipping to the Texas ports. The lawfulness of a separately stated charge for an accessorial service must be determined independently of other charges and services.

ARGUMENT

I.

THE ORDER OF THE COMMISSION IS NOT SUPPORTED BY THE FINDINGS IN THE REPORT

Appellant claims a right under Section 2 to an equality in the charges for loading. It also claims a right under Section 3(1) to be free from undue prejudice. When a proposed destruction of the existing equality of charges is in issue at a full hearing pursuant to Section 15(7), the Commission is not authorized to approve the proposal as lawful except upon considerations authorized by the governing statute. Such approval is unsupported, insofar as Section 2 is concerned, unless predicated (a) on a finding that the traffics are unlike; (b) on a finding that the services are unlike; or (c) on a finding that the services are performed under substantially dissimilar circumstances and conditions. As to Section 3(1), such approval is valid only if supported by a finding that the prejudice, which plainly results, is excused, and consequently not undue, because of particular considerations to be stated in the report. In the case of Section 3(1) the nature of the considerations which might support the ultimate conclusion cannot be stated with the same precision as in the case of Section 2 because Section 3(1) is phrased in broad language while Section 2 specifies the matters which Congress intended to be controlling upon the application of that section.¹⁴

¹⁴ In *R. R. Commission of Geo. v. Clyde Steamship Co. et al.* (1892), 51 C. C. 224 (4 I. C. R. 129), at pages 374-5, the Commission said:

"This undue preference clause may justly be termed an omnibus provision, enacted first by Parliament and then by Congress, to prohibit carriers from doing any act which unduly or unreasonably puts one shipper or description of traffic up in the scale of favor or puts another shipper or description of traffic down, to his or its disadvantage or wrong. But when the Act to regulate commerce was

In the absence of such findings, there is no disclosure that the Commission applied the authorized statutory standards rather than some undefined standards of its own. An order of an administrative agency, which is not supported by findings sufficient to disclose a correct application of statutory standards, is void and must be enjoined. It was so held in *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 506, involving an order entered in a suspension case, and in *United States v. Carolina Freight Carriers Corporation*, 315 U. S. 475, involving the denial of a right claimed under the Interstate Commerce Act.

The ultimate conclusion of the Commission is that the proposed change "is just and reasonable and not shown to be otherwise unlawful."¹⁵ (R. 32; 248 I. C. C. 654) The concluding phrase is the equivalent of a finding that "the proposed change is not shown to be in violation of or prohibited by Section 2 or Section 3(1)." The vice of the report is that such an ultimate conclusion is not supported by preliminary findings as to the matters noted in the first paragraph under this heading.

The concluding portion of the report, which contains findings upon the facts characterized by the Commission as "pertinent," (R. 30-32; 248 I. C. C. 653-4) completely ignores the difference in charges complained of by the

passed Congress not only adopted that clause but saw fit to go further and specify that certain charges by the carrier would "in themselves constitute wrong. The second and fourth sections of the Act—that is, the unjust discrimination and long and short haul clauses—are provisions of this character. * * * These provisions describe the offence and limit the circumstances and conditions to be considered to those under which the transportation is conducted."

¹⁵ Earlier in its report, and immediately before the paragraph which begins "The pertinent facts are these," the Commission said (R. 30; 248 I. C. C. 653): " * * * from the evidence presented in the instant proceedings it has not been shown that any provisions of the Interstate Commerce Act would be violated if the suspended Oklahoma rule is permitted to become effective."

appellant and contains no finding to dispose of the controversy as to whether there is in fact a difference in circumstances and conditions which takes the case out of Sections 2 and 3(1); nor do any of the recitals contained in the preceding paragraphs of the report contain such findings.

The two dissimilarities relied upon by the railroad appellees relate to (a) an alleged difference in truck competition, and (b) an alleged difference in the levels of the respective carload rates for line-haul services. As to neither of these alleged differences does the report contain a simple, clear finding offered as a predicate for the ultimate conclusion.

Truck competition. The recitals in the report as to truck competition are to be considered in the light of the place at which the loading service is performed, and in the light of the portion of the through service which encounters the truck competition. The tariff in issue relates to a loading service only at the gin origin at the inception of the gin-to-compress portion of the through service.¹⁶ Loading at the compress point, either free or for a charge, is not involved. (R. 122-3) The intense truck competition is encountered in connection with the gin-to-compress move. That competition is not affected by the ultimate destination to which the cotton may be later reshipped from the compress and is encountered equally if the cotton is subsequently reshipped to the Southeast or if the cotton is subsequently reshipped to the Texas ports. (R. 137; 32-3; 248 I. C. C. 654) See map at back of this brief.

With this background, we note the Commission's recitals: First, a statement of the cotton tonnage secured by the Santa Fe Railroad from twenty-five counties in Oklahoma

¹⁶ The tariff provisions which make this plain are reproduced in Appendix "C" hereto.

in comparison with the cotton tonnage produced therein, the balance moving "by motortruck or by other rail carriers." (R. 22, 23; 248 I. G. C. 648-9) This is not a finding of differences in conditions as between cotton shipped to the Southeast and cotton shipped to the Texas ports. It is not even a clear finding as to truck competition as distinguished from competition with the other respondents in the case before the Commission.

Second, a statement that in the 1939-40 season "22,163 bales of cotton moved by motortruck from compress stations in Oklahoma," which is shortly followed by a statement that "there is no trucking of cotton from Oklahoma to Memphis or to the Southeast." (R. 23; 248 I. C. C. 649) While this statement implies a difference in conditions, the statement relates to trucking out of compresses. Consequently, it is not a finding relevant to the real issues which involve the loading service and charge at the gin origin at the inception of the gin-to-compress move.

Third, the report states: "The competition with trucks in Texas was found to be greater to the Gulf ports than from Oklahoma points to the Gulf ports but the competition with trucks at the country stations to the compress points is shown to be proportionately keen in both States." (R. 24; 248 I. C. C. 649) This is not a finding as to a difference in conditions as between cotton shipped to the Southeast and cotton shipped to the Texas ports.

These are all the recitals in the report which even remotely relate to the point under discussion. No one of them supports the order insofar as the issues under Sections 2 and 3(1) are concerned.

Relative line-haul rate levels. Assuming, *arguendo*, that relative rate levels are entitled to consideration as a relevant circumstance in this case, the theory must be:

that cotton to the Southeast is not paying as much for line-haul transportation services as it ought to pay if properly related to the line-haul rates to the Texas ports, all transportation conditions which affect line-haul transportation being considered; consequently, that the addition of a loading charge on cotton to the Southeast (from which cotton to the Texas ports is free) will not result in a relation of aggregate charges which is unfair to the Southeastern movement. Leaving the relevancy of this theory to be considered below, we now show that the theory is not supported by any finding in the report.

The Commission does state:¹⁷ "Regardless, however, of the fact that rates to the southeast are relatively lower than to the Texas Gulf ports, respondents stand ready to make the same free loading rule applicable from Oklahoma to such southeastern destinations."¹⁸

This is not a finding; rather it is a recital of a railroad contention. Even if treated as a finding, it is without significance. The rates to the Southeast are actually higher in cents per hundred pounds than to the Texas ports. (See Exhibit 38 reproduced in Appendix "B" hereto.) In view of that circumstance, there is nothing in the report which discloses what the Commission meant by using the words "relatively lower." The report does not disclose the standard used to measure the relation. While a finding that cotton to the Southeast does not pay as much for line-haul service as it ought to pay in relation to the Texas ports would have a definite meaning, the words "relatively lower" convey no meaning, insofar as any issue

¹⁷ With a substitution of the word "southwestern" for the word "southern" this sentence is taken verbatim from page 27 of the Argument in the brief of the railroad respondents before the Commission. (Plaintiff's Exhibit 4 in the District Court, which is covered by the stipulation not to print.)

¹⁸ Despite this statement, the respondents (railroad appellees) have not provided free loading to the Southeast, although they have power to do so any time they desire.

in this case is concerned. Something more precise is required.

The statement quoted from the report is meaningless as a finding for still another reason: The report does not connect it in any way with the issues involved under Sections 2 or 3(1) of the Act, or with the ultimate conclusion of the Commission on such issues. Before a finding can be treated as in support of an ultimate conclusion, some relation between the two must be disclosed.

It cannot be said here, as in other cases, that the report contains findings which are definite and comprehensive, *Alabama v. United States*, 283 U. S. 776, 779; *Georgia Pub. Serv. Commission v. United States*, 283 U. S. 765, 773; nor can it be said that appellant demands an impracticable exactness, *Florida v. United States*, 292 U. S. 1, 9, or that there was any administrative difficulty in making clear, simple, and precise findings on the issues, *United States v. Louisiana*, 290 U. S. 70, 78. Nor can appellant be charged with contending that the Commission is required to disclose the detail of the mental operations by which its decisions are reached, *Baltimore & O. R. Co. v. United States*, 298 U. S. 349, 359 or that the Commission is required to frame its findings in a formal manner, *United States v. Louisiana*, 290 U. S. 70, 80.

Appellant only urges that an order of the Commission cannot be sustained unless it discloses the basic facts on which predicated, and that this Court is not required to search the record or to indulge in implications in order to supply essential findings which are otherwise lacking, *Atchafalaya, T. & S. F. Ry. Co. v. United States*, 295 U. S. 193, 201-2.

In Finding No. 23 (R. 83), the District Court adopted as its own the findings of fact in the report of the Com-

mission. The District Court did not, however, identify the language in the report which it so adopted.

Finding No. 24 of the District Court (R. 83) reads:

"The Commission found, *inter alia*, that there is (1) no trucking of cotton between points in Oklahoma and the Southeast, whereas there is trucking of cotton between points on Oklahoma and the Gulf ports, (2) that the carload rates on cotton from Oklahoma origins to the Southeast are on a relatively lower basis than the carload rates on cotton from the same origin to the Gulf ports, and (3) that the rates from points in Oklahoma both to the Southeast and to the Gulf ports are depressed."

The foregoing statement evidences the same lack of precision as the statements in the report of the Commission commented upon above. Additionally, it is erroneous to characterize the statement of the Commission regarding the relation of the carload rates as "a finding"; rather, it is a mere recital of a railroad contention.

II.

THE ORDER OF THE COMMISSION IS NOT SUPPORTED BY THE EVIDENCE

The undisputed evidence shows: (1) a difference in the charges for loading as between shippers of cotton to the Southeast and shippers of cotton to the Texas ports; (2) identical loading services for both shippers as to the place where performed and as to the method of performance; (3) immediately after loading, identical moves via the lines of the railroad appellees at the same "float-in" rates from the gin origin to the concentration (compress) point (R. 135-6); and (4) a disadvantage imposed on appellant and a corresponding advantage conferred on its competitors in the buying and shipping of cotton which flows

directly from the assailed difference in the loading charge. (R. 259-262)

In such a case, this Court could well say, as it did, in *Mitchell v. United States*, 313 U.S. 80, 90, there is no room for administrative judgment, and the appellant is entitled to the protection of the statute which forbids the conduct of which it complains.

Passing for later consideration the question of the legal significance of the differentiating circumstances relied upon by appellees, we now consider them from the standpoint of the evidence.

Truck competition. Appellant admits that the evidence supports the recitals as to truck competition quoted from the report under Point I above. However, since such recitals and evidence do not show a difference between the cotton handled from gin to compress which is later reshipped to the Southeast, on the one hand, and the cotton handled from gin to compress which is later reshipped to the Texas ports, on the other hand, such evidence affords no support for the order.

Relative line-haul rate levels. In the course of his cross, although not in his direct, examination, the principal witness for the respondents before the Commission said (R. 137):

"Insofar as the justification of it is concerned, there is another justification for not doing it—that is, the rates to the Southeast are already lower, relatively, than they are to the ports."

This witness did not elaborate on the casual statement just quoted.

After the respondents had concluded their case in chief and the protestants had been heard, the respondents called another witness who offered Exhibits 32 to 39, inclusive.

(introduced and described at R. 269-73) which consisted of maps and comparative statements of distances, rates, earnings per ton mile and per car mile from Oklahoma origins to Houston, Texas, and to Southeastern destinations. As representative of these, Exhibit 38 is reproduced in Appendix "B" hereto. The witness pointed to the fact that these exhibits showed that the rates for the longer hauls to the Southeast produced lower earnings in mills per ton mile or in cents per car mile than the rates for the shorter distances to Houston, although the latter rates are much the lower in cents per hundred pounds. The witness also made a categorical statement that these comparisons indicate, "a much lower level of rates to the large consuming portion of Southern territory." (R. 271)

The record contains no other evidence bearing upon the question of relative levels of line-haul rates, and the District Court so found.¹⁹ (R. 82) The Commission has many times held that rates for longer distances should properly yield lower earnings per mile than rates for shorter distances²⁰ and that a bare rate comparison which shows nothing but rates and distances is without probative value.

¹⁹ The finding of the District Court reads: "The evidence before the Commission was confined to a comparison of the rates, distances, ton-mile earnings, and car-mile earnings involved, and no evidence was offered as to the specific costs of the respective line-haul services or as to any transportation circumstance, and condition incident to line-haul services other than the mere matter of distance."

²⁰ "It is a well-recognized principle of rate-making that as distance increases ton-mile earnings decrease." *Magee Carpet Co. v. C. R. R. Co. of N. J.* (1928), 144 I. C. C. 281, 282. "It is proper that car-mile revenue should increase generally as distance decreases." *Consolidated Cottonseed Co. v. Arkansas & M. Ry. B. & T. Co.* (1932), 182 I. C. C. 12, 13. See also *Montana Horse Products Co. v. Atchison, T. & S. F. Ry. Co.* (1934), 203 I. C. C. 681, 686; *Cattle Raisers' Assn. of Tex. v. M., K. & T. Ry. Co., et al.* (1908), 13 I. C. C. 418, 426; *Boxes or Cartons, Indiana and Michigan to W.T.L. Points* (1937), 222 I. C. C. 91, 95.

R. R. Commission of Geo. v. Clyde Steamship Co., et al. (1892), 5 I. C. C. 324 (4 I. C. R. 120), 376.

"* * * To charge less per mile for greater distance is a common rule of transportation, and its legality is well settled."

particularly when the rates apply in different territories.²¹ Any test of rates as to measure or relation involves many factors, including the cost of the service, as well as other transportation conditions, and cannot be disposed of by a categorical statement, *United States v. Illinois C. R. Co.*, 263 U. S. 515, 524; *Interstate Com. Com. v. Union P. R. Co.*, 222 U. S. 541, 549.

In the absence of any evidence other than a bare statement of rates and distances, the Commission was not in a position to come to any conclusion, one way or the other, as to whether the rates to the Southeast were either higher or lower than they should be in relation to the rates to the Texas ports. *Alton & S. R. Co. v. Illinois Commerce Commission* (1925), 316 Ill. 625, 147 N. E. 417. We do not ask this Court to substitute its judgment for that of the Commission as to how this rate relation appears; we do ask this Court to find that there was no evidence to support any finding on the point.

Assuming this Court agrees with us as to the lack of evidence on one of these matters and disagrees with us as to the lack of evidence on the other matter, the order should nevertheless be enjoined. The lawfulness of rates and charges depends on many elements and facts. If the Commission erred as to one factor only on which it relied in its final determination, this Court is not in a position to say that the Commission would have come to the same ultimate conclusion if that factor be laid aside from view.

²¹ "Comparisons with other coal rates are of value only if supported by comparisons of operating conditions, and they are not so supported in this case." *Mutual Coal, Light & Power Co. v. A. T. & S. F. Ry. Co.* (1934), 205 I. C. C. 243, 252. "Other comparisons, based on distances alone, were introduced. We have repeatedly pointed out that such comparisons have slight probative value." *Burge-Doyle Live Stock Co. v. A. T. & S. F. Ry. Co.* (1924), 87 I. C. C. 319, 320. See also *Box Sand Co. v. A. T. & S. F. Ry. Co.* (1926), 112 I. C. C. 121, 123; *Smith & Cp. v. Chicago & A. R. Co.* (1921), 171 I. C. C. 605, 607; *Mayer & Co. v. C. & St. P. Ry. Co.* (1922), 69 I. C. C. 519, 521; *Nebraska Seed Co. v. Director General* (1921), 64 I. C. C. 75, 77.

If this Court were so to hold, it would be akin to substituting the judgment of this Court for that of the administrative body in that this Court would be announcing what the administrative body should conclude as a fact before the administrative body speaks. *Interstate Commerce Commission v. Clyde Steamship Co.*, 181 U. S. 29, 32-3.

Consequently, if this Court finds that there is no support in the evidence as to any item which was relied upon by the Commission, appellant respectfully suggests that the appropriate procedure would be to set aside the existing order so that the Commission might have an opportunity to express its administrative judgment upon the basic facts when limited to those which are entitled to its consideration.

III.

THE ORDER OF THE COMMISSION IS BASED UPON CONSIDERATIONS NOT LEGALLY RELEVANT TO THE ISSUES AND UPON STANDARDS OF LAWFULNESS NOT AUTHORIZED BY THE STATUTE.

For the purpose of considering what conditions and circumstances were legally entitled to consideration by the Commission, we will assume, *arguendo*, (a) that the report contains a finding that the cotton reshipped by appellant to the Southeast is subject to a different degree of truck competition for the move out of the gin origin than the cotton reshipped by its competitors to the Texas ports; (b) that the report contains a finding that the line-haul rates to the Southeast are not as high as they ought to be if properly related to the line-haul rates to the Texas ports; (c) that the assumed findings are presented in the report as the predicate for the ultimate conclusion; and (d) that the evidence supports the assumed findings. The question remains whether these are dissimilarities which the Com-

mission was legally entitled to consider in this case, in which the only issue is as to the lawfulness of a proposed change in the charges for a loading service.

A. THE MATTERS ENTITLED TO CONSIDERATION UNDER SECTION 2 ARE LIMITED TO THOSE WHICH RELATE DIRECTLY TO THE LOADING SERVICE AND TO CHARGES THEREFOR.

Section 2 of the Act prohibits unjust discrimination as between shippers and, at the same time, defines with precision the facts which must be present in order to render the discrimination *unjust*. That section leaves to the determination of the Commission only the question of whether a particular situation is embraced as a fact within the prohibition. In this respect it is different from other sections of the Act which do not define what constitutes an unreasonable or a prejudicial rate. Unjust discrimination is defined as the charging of one person more than another person for "a like and contemporaneous service in the transportation of a like kind of property under substantially similar circumstances and conditions."

By its own terms, Section 2 operates within a very narrow field. The very narrowness of that field leaves little room for administrative discretion. Once the Commission has made findings as to the basic facts, Section 2 either applies or does not apply to a case showing a difference in charges, dependent upon whether the findings announce similarities or dissimilarities in the controlling circumstances and conditions. The question of whether a particular dissimilarity is within the meaning of the statute is a question of law for this Court to decide and not a question of fact as to which the judgment of the Commission is final. *Mitchell v. United States*, 313 U. S. 80; *Interstate Commerce Commission v. Diefenbaugh*, 222 U. S. 42; *Interstate Commerce Commission v. B. & O. R. Co.*, 145 U. S. 263.

1. A difference in charges for identical loading services at the inception of the "float-in" move is not taken out of Section 2 by a difference in the destinations to which the cotton is subsequently reshipped from the concentration points.

In the District Court the appellees contended that the difference in the destinations to which the cotton is reshipped after concentration makes Section 2 wholly inapplicable to this case. If that contention be sound, then appellant has no case under Section 2, and it would be unnecessary to consider whether the other alleged dissimilarities are legally entitled to consideration.

Appellant urges that the contention is not sound for the following reasons:

(1) Section 2 is recognized as modeled on Section 90 of the English Railway Clauses Consolidation Act of 1845, 8 & 9, Vict., ch. 20, known as the "Equality Clause," which is reproduced on page 54 of Appendix "A" hereto. *Interstate Commerce Commission v. Delaware, L. & W. R. Co.*, 220 U. S. 235, 253-5. Yet there is a fundamental difference in phraseology between the two statutes which plainly evidences an intent on the part of Congress to have Section 2 apply independently to all separately stated accessorial services and charges, such as loading, despite a complete dissimilarity in the matter of the line-haul services. The prohibition against unequal charges in the English statute is restricted to charges on goods "conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway." Congress did not so narrow Section 2; rather it made Section 2 applicable to a difference in charges for "any service rendered, or to be rendered, in the transportation of property," subject only to the general limitation that the services be "like" and be rendered under "substantially similar circumstances and conditions."

In *R. R. Commission of Geo. v. Clyde Steamship Co. et al.* (1892) 5 L. C. C. 324 (4 L. C. R. 120) at page 375, the Commission said:

"Considerable variation in language is also found in comparing the English equality clause of 1845 with the second or unjust discrimination clause of our law. That the latter covers much more ground must be apparent to the casual observer, * * *."

And at page 377, said:

"* * * Section 90 of the 1845 statute, in its proviso required equality when the carriage is over the *same portion of the line* under the same circumstances. Section 2 of our Act only requires the traffic to be like, the service to be like and contemporaneous, and the transportation under *substantially similar* circumstances and conditions. The provisions are so different in terms that the same set of facts might constitute immunity under the English provision and guilt under our law."

By reason of this difference, the English cases which involve a claim of unjust discrimination in charges for identical accessorial services also show identical line-haul services in order to meet the requirement of "passing only over the same portion of the line of railway"; whereas the cases in which the Commission has required identical line-haul services as a predicate for an application of Section 2 are limited to those in which the charges in issue were assessed for the movement of traffic from one point to another. In such cases, the Commission repeatedly notes that Section 2 is inapplicable unless the traffic is moved over the same tracks in each case since, otherwise, the circumstances and conditions directly governing the services for which the unequal charges are assessed could not be similar.

However, when the charges assessed are for services other than the movement of traffic over tracks from one

point, to another, the Commission holds separately established charges for accessorial services "must stand or fall as such" and that Section 2 applies even though there is a difference in the points from or to which the traffic moves and in the routes by which the service is performed. *Birkett Mills v. D., L. & W. R. R. Co.* (1927), 123 I. C. C. 63, 65. Such a construction and application of the statute is required to carry out the intent of Congress as plainly indicated by the language of Section 2. Certainly, there are no words in that section nor anything in its legislative history to suggest that it applies to separately stated accessorial services and charges *only* when the aggregate services are identical.

If it be true that Section 2 applies to a difference in charges for identical accessorial services only when the line-haul services are likewise identical, a preliminary finding to the latter effect would be jurisdictional whenever a Section 2 order is issued; yet in *Merchants Warehouse Co. v. United States*, 283 U. S. 501, 511, this Court sustained an order of the Commission based on a finding of unjust discrimination in the matter of loading services and charges although the report of the Commission (*Gallagher v. Pennsylvania R. Co.* (1929), 160 I. C. C. 563) completely ignored the matter of the line-haul services.

In *Wight v. United States*, 167 U. S. 512, this Court emphasized the fact that the shipper who was unjustly discriminated against in the matter of drayage at destination also received the same line-haul service as that given to the shipper receiving the free drayage. However, that case does not hold that there must be identical line-haul services in order to make Section 2 applicable to a case such as this in which the tariffs provide a separately stated terminal charge on the traffic of one shipper but not on the traffic of another shipper, both receiving identical terminal services. Properly considered, the discrimination in the *Wight* case

resulted from the fact that in neither instance did the tariff provide for the terminal service, yet it was accorded one shipper and denied another. Today, that would be a rebate punishable under the Elkins Act (Title 49, U.S.C. Sec. 41-43) enacted subsequent to the *Wight* case.

(2) Section 1(3)(a) defines "transportation" as including "all services in connection with the receipt * * * and handling of property transported". Section 6(1) requires carriers to state separately all terminal charges. This further evidences the intent of Congress to have the lawfulness of each individual terminal charge considered on its own merits regardless of what other services may be performed by the same or other carriers on the same shipment.

(3) In cases involving Section 2 as applied to charges for line-haul services, this Court has consistently held that the circumstances legally entitled to consideration do not include "differences in circumstances arising either before the service of the carrier began or after it was terminated." *Interstate Commerce Commission v. Delaware, L. & W. R. Co.*, 220 U. S. 235, 253-4; *Interstate Commerce Commission v. B. & O. R. R. Co.*, 225 U. S. 326, 342-3. There is no logical reason why that construction of the statute should be confined to a case involving charges for line-haul services and not extended to a case involving charges for terminal services, such as loading. In either case, the conditions legally entitled to consideration should be restricted to those which relate to the service for which the charges apply. The prohibition of the statute runs against the collection of a different charge from one person than from another person "for any service rendered, or to be rendered, in the transportation of * * * property." The phrase "under substantially similar circumstances and conditions" exhausts itself upon the particular services for

which the charges are assessed, and does not embrace other services separated therefrom.

The injury of which appellant complains is a direct result of a difference in the charges for identical loading services. It claims a right to have the Commission forbid the conduct of which it complains. The appellee railroads cannot escape the application of Section 2 to the loading charges and services because at some subsequent time other carriers which have no control over the loading services and charges and do not participate therein, but which participate with the appellees in the through line-haul move, transport the traffic in line-haul services to a variety of destinations. (See map at back of this brief.)

(4) The issue in the case as framed by the order instituting the investigation requires the application of Section 2 (as well as Section 1(5)(a) and Section 3(1)) to the loading charges and services independent of all other charges and services.

If Section 2 is inapplicable to the case presented by the appellant because the destinations are different, then the aggregate charges for the line-haul services plus the loading services must have been in issue so as to be subject to such order as the Commission might find to be required under the facts. But the line-haul services and charges were not in issue before the Commission, nor did the respondents before the Commission include the connecting railroads of the appellees which make up the through routes to the Southeast. It thus appears that there was no issue under which the Commission could have dealt with the lawfulness of the aggregate of line-haul charges and of loading charges, even if it had so desired. The Commission had authority to deal only with the separately stated loading charges and services and could compel obedience to statutory standards of lawfulness only by the railroad appellees,

which alone were responsible for the difference in charges of which appellant complains. *Central Railroad Co. of New Jersey v. United States*, 257 U. S. 247.

If appellees are right as to the proper construction of Section 2, appellant had no rights whatsoever in the case, regardless of the proof, and the Commission was powerless to enforce that equality of treatment which the statute commands. But the statute should not be construed as self-destructive.

(5) Section 2 by its terms applies to a difference in the charges assessed "for *any service* rendered, or to be rendered." In this respect it is like Section 1(5)(a) which relates to the reasonableness of the charges "made for *any service* rendered or to be rendered." In a case arising under Section 1(5)(a), this Court held that the lawfulness of a terminal charge must be tested by an independent consideration of that charge and the service to which it applies, without combining that charge and service with the line-haul charge and service. *Interstate Commerce Commission v. Stickney*, 215 U. S. 98, 105, 109. Insofar as the propriety of testing the lawfulness of a separately stated terminal charge independently of the line-haul services is concerned, the instant case cannot be distinguished from the case cited since there is no reason to construe "any service" in Section 2 differently than in Section 1(5)(a).

(6) In *Central Railroad Co. of New Jersey v. United States*, 257 U. S. 247, a Section 3(1) case involving an accessorial service (creosoting-in-transit), the Commission found that undue preference and prejudice was occasioned by the maintenance of the transit privilege at some points and not at others. Certain connecting carriers in the joint through rate structure, which did not maintain the privilege at their own stations, sought to enjoin the order on the ground that the mere fact of their participation in the

through rates did not make them responsible for preference and prejudice growing out of the privileges maintained by and on other lines. This Court agreed with that view and held that the Commission erred as a matter of law in treating such a service, local to the line performing it, as an integral part of the joint line-haul service. To couple the accessorial service with the line-haul services in the instant case, which must be done if a difference in destinations serves to take the case out of Section 2, would be contrary to the principle of the case cited.

2. The alleged difference in the relative levels of the through line-haul rates, and the alleged difference in the matter of truck competition, did not constitute a dissimilarity of circumstances and conditions within the meaning of Section 2.

If Section 2 applies in this case, regardless of the difference in ultimate destinations, the question still remains as to whether the service of loading on the cotton subsequently reshipped to the Southeast is performed under substantially similar circumstances and conditions as on cotton subsequently reshipped to the Southeast. That presents a question of fact as to the existence of any particular circumstance showing a similarity or a dissimilarity. It is a question of law as to what circumstances are entitled to consideration.

All parties will concede that there is no difference in the physical services rendered in the loading of the cotton. Furthermore, the initial move of the cotton to concentration point is the same service on the same "float-in" rate, regardless of the ultimate destination to which the cotton may be subsequently reshipped after the concentration and compression. (R. 135-6) The identical "float-in" services depicted on the map at the back of this brief are from Lindsay (country origin) to Paul's Valley (transit point).

The railroad appellees claim, as the Commission alleges in paragraph X of its answer in the District Court (R. 59), that controlling dissimilarities do exist in the matter of the relative levels of the through line-haul rates applied under transit and in the matter of competition with motor-truck service. The lower Court held in its fourth conclusion of law (R. 84) that the Commission had properly considered these dissimilarities under both Sections 2 and 3(1). Appellant submits that neither of these alleged dissimilarities is legally entitled to consideration under Section 2.

It is well settled and no longer open to question that a difference in the matter of competition with another transportation agency is not entitled to consideration as a dissimilarity of circumstances and conditions within the meaning of Section 2. *Wight v. United States*, 167 U. S. 512, 518; *Interstate Commerce Commission v. Alabama M. R. Co.*, 168 U. S. 144, 166; *Seaboard Air Line Railway Co. v. United States*, 254 U. S. 57, 62. The Commission has repeatedly recognized and applied this rule in other cases involving separately stated terminal charges and services. *Drayage Absorptions by S. W. M. R. R. Co.* (1926), 113 I. C. C. 179, 185; *Absorption of Loading Charge* (1930), 161 I. C. C. 389, 391-2; *Allowance for Driving Horses at Miles City, Mont.* (1938), 227 I. C. C. 387, 389.

The effect of these cases and of the other cases in which this Court has construed Section 2, (*Interstate Commerce Commission v. Delaware, L. & W. R. Co.*, 220 U. S. 235, *Interstate Commerce Commission v. B. & O. R. R. Co.*, 225 U. S. 326) is that no circumstances and conditions extraneous to the services for which the charges in issue apply may be relied upon as showing a dissimilarity within the meaning of Section 2. The only conditions and cir-

circumstances legally entitled to consideration must relate directly to the service in issue. What happens to the goods or to the shipper before or after that particular service is rendered cannot serve to justify a difference in charges. Consequently, a difference in line-haul charges incurred upon the reshipment from the transit point is not legally entitled to consideration.

Apart from the authorities above cited, there is no logical basis on which to support the view that a difference in the relative levels of the through line-haul rates is sufficient to excuse discrimination in the charges assessed for the loading services. The charges for line-haul services incurred when the cotton is reshipped and a transit settlement claimed have no relation to, or connection with, the charges for the loading services. Many carriers participate in and control such line-haul services; only the railroad appellees participate in and control the loading services and charges. Whether the connecting carriers, in participating with the appellees, charge too much or too little for line-haul services cannot affect the right of the railroad appellees to exact reasonable compensation for any separate terminal service performed solely by them. *Interstate Commerce Commission v. Stickney*, 215 U. S. 98, 105, 109. However, that right is accompanied by an obligation to charge equally. While the reasoning of the *Stickney* case was squarely directed to the independence of the right, the principle thereof is equally applicable to the independence of the obligation. The acts of the connecting railroads cannot serve to modify the obligation any more than such acts can serve to modify the right. *Central Railroad Co. of New Jersey v. United States*, 257 U. S. 247. Compare *Atchison, T. & S. F. Ry. Co. v. United States*, 279 U. S. 768, 779.

In concluding, as to Section 2, appellant suggests that

there would be no real difference between that section and Section 3(1) if the lower Court were right in adopting the construction of Section 2 urged upon it by appellees. However, properly construed, these sections are quite different in respect to the matters entitled to consideration in determining issues presented thereunder. As was said by Lord Herschell in *Phipps v. N. & W. R. Co.* 2 Q. B. 229, 249, with reference to the corresponding provisions in the English Statute:

"The words of the equality clause have no elasticity at all; there are no outside circumstances to be taken into consideration, and it is not a question of regarding the position of one trader as compared with the other, and then saying whether there is any undue preference.²² It is an absolute rigid equality which is demanded by the statute."

B. THE LAWFULNESS UNDER SECTION 3(1) OF SEPARATELY STATED TERMINAL CHARGES FOR LOADING MUST BE TESTED INDEPENDENTLY AND WITHOUT MERGING THEM WITH THROUGH RATES FOR LINEHAUL TRANSPORTATION.

This Court has recognized that competition with other carriers may serve to justify a relation of rates which otherwise would appear to be unfair and prejudicial under Section 3(1): *Interstate Commerce Commission v. Alabama, M. R. Co.*, 168 U. S. 144, 166. Consequently, appellant's claim of error involving the Commission's consideration of the alleged difference in truck competition is restricted to its disposition of the case under Section 2.

In the case of the Section 3(1) issue, the error of the Commission in statutory construction and application rests on the fact that, according to its counsel and to the rail-

²² The undue preference provision in the English Statutes (Sec. 2 of the Act of July 19, 1854, for the better regulation of traffic on railways and canals, 17 and 18 Vict. c. 31; and Sec. 11 of the English Act of July 21, 1873, 36 and 37 Vict. c. 48) is phrased in broad terms similar to Section 3 in the Interstate Commerce Act.

road appellees, it considered the disparity in the loading charges as justified by the alleged difference in the relative levels of the through line-haul rates.²³ Such line-haul rates have no relation to the loading charges. As stated, the line-haul rates to the Southeast are maintained by the railroad appellees in participation with many other connecting carriers. The connecting carriers have no control over, or interest in, the loading services and charges of the railroad appellees, except by way of comparison with their own services and charges. Appellant is entitled to be free of the undue prejudice which is caused by the railroad appellees alone, regardless of whether the connecting carriers participated with such appellees in charging too much or too little for the line-haul services which they perform to the Southeast. *Interstate Commerce Commission v. Stickney*, 215 U. S. 98.

The error here is the converse of that found in *Central Railroad Co. of New Jersey v. United States*, 257 U. S. 247. To make this plain, assume that the line-haul rates to the Southeast were higher than they should be as compared with rates to the Texas ports, and that the railroad appellees insisted on maintaining an equality of separately stated charges for loading services to both destination territories. Further assume that the appellant sought and obtained from the Commission an order under Section 3(1) requiring the railroad appellees to load the cotton free when reshipped to the Southeast, but not to the Texas ports, in order to provide appellant with aggregate charges properly related to those of its com-

²³ In order to present argument on this point, appellant must assume, *arguendo*, that the ultimate conclusion of the Commission is predicated on the alleged difference in relative levels of line-haul rates as contended for by the appellees. However, the report of the Commission does not plainly disclose any such predicate for its ultimate conclusion.

petitors shipping to the Texas ports. Such an order would be plainly bad, since it would deprive the railroad appellees of their right to control all charges for local services performed by them, independently of their participation in joint rates for line-haul services. The disposition of this case by the Commission under Section 3(1) is equally inconsistent with the recognition of that right.

CONCLUSION.

Appellant respectfully submits that the decree of the District Court should be reversed and the case remanded with directions to enter the injunction as prayed for.

LUTHER M. WALTER,

JOHN S. BURCHMORE,

NUEL D. BELNAP,

Counsel for Appellant

February, 1943.

APPENDIX "A"

STATUTES CITED.

Part I of the Interstate Commerce Act.

SECTION 1(1)(a) (TITLE 49, U.S.C., SEC. 1(1)(a)).

"(1) That the provisions of this chapter shall apply to common carriers engaged in—

"(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment;

"* * * from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation or transmission takes place within the United States."

SECTION 1(3)(a) (TITLE 49, U. S. C., SEC. 1(3)(a)).

"(3) (a) The term 'common carrier' as used in this chapter shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word 'carrier' is used in this chapter it shall be held to mean 'common carrier.' The term 'railroad' as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal

facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "person" as used in this chapter includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof."

SECTION 1 (5) (a) (TITLE 49, U.S.C., SEC. 1(5) (a)).

"(5) (a) All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

SEC. 2 (TITLE 49, U.S.C., SEC. 2).

"If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful."

SECTION 3(1) (TITLE 49, U.S.C., SEC. 3(1)).

“(1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person; company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.”

SECTION 6(1) (TITLE 49, U.S.C., SEC. 6(1)).

“(1) Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such

schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this chapter."

SECTION 15(1) (TITLE 49, U.S.C. SEC. 15(1)).

"(1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this chapter or after full hearing under an order for investigation and hearing made by the commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property as defined in the first section of this chapter, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare,

or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

SECTION 15(7) (49 U.S.C. SECTION 15(7)).

"(7) Whenever there shall be filed with the commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the commission, upon filing with such schedule and delivering to the carrier or carriers affecting thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing

and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

THE "EQUALITY CLAUSE" IN THE ENGLISH STATUTE.

Section 90 of the Railway Clauses Consolidation Act of 1845, 8 & 9, Vict., ch. 20:

"XC. "And whereas it is expedient that the Company should be enabled to vary the Tolls upon the Railway so as to accommodate them to the Circumstances of the Traffic, but that such Power of varying should not be used for the Purpose of prejudicing or favouring particular Parties, or for the Purpose of exclusively and unfairly creating a Monopoly, either in the Hands of the Company or of particular Parties;" it shall be lawful, therefore, for the Company, subject to the Provisions and Limitations herein and in the special Act contained, from Time to Time to alter or vary the Tolls by the special Act authorized to be taken, either upon the whole or upon any particular Portions of the Railway, as they shall think fit; provided that all such Tolls be at all Times charged equally to all Persons, and after the same Rate, whether *per Ton*

per Mile or otherwise, in respect of all Passengers, and of all Goods or Carriages of the same Description, and conveyed or propelled by a like Carriage or Engine, passing only over the same Portion of the Line of Railway under the same Circumstances; and no Reduction or Advance in any such Tolls shall be made either directly or indirectly in favour of or against any particular Company or Person travelling upon or using the Railway."

APPENDIX "B"

Immediately after this page appears a planographic reproduction of Exhibit 38 in the proceedings before the Commission (introduced at R. 273).

9

Comparative Statement of Distances, Rates and Earnings to Houston and Representative Destinations in Southern Territory From The Following Oklahoma Origins Representative of Origin Group No. 6660, as Published in Southwestern Lines' Tariff No. 208-G, I.C.C. No. 3370:

Anadarko
Chickasha
Clinton
Elk City
Hobart
Oklahoma City
Pauls Valley
Waurika

From Oklahoma Origins Shown on Page No. 1.

[illegible]

To		(2) Average Shortline Distance (Miles)	Rates				Average Earnings							
							MTM				CCM			
			Col. 1	Col. 2	Col. 3	Col. 4	Col. 1	Col. 2	Col. 3	Col. 4	Col. 1	Col. 2	Col. 3	Col. 4
Athens,	Ga.)	1030	76	67	61		14.8	13.0	11.8		18.4	22.8	29.6	
Macon,	Ga.)													
Moultrie,	Ga.)													
Dublin,	Ga.)	1068	78	69	63		14.6	12.9	11.8		18.3	22.6	29.5	
Albertain,	Ga.)													
Kingsport,	Tenn.)	1058	78	69	63		14.7	13.0	11.9		18.4	22.8	29.8	
Morristown,	Tenn.)													
Augusta,	Ga.	1131	80	71	65		14.1	12.6	11.5		17.7	22.0	28.7	
Brunswick,	Ga.	1157	84	75	69		14.5	13.0	11.9		18.2	22.7	29.8	
Columbia,	S.C.)	1193	82	73	67		13.7	12.2	11.2		17.2	21.4	29.1	
Charlotte,	N.C.)													
Darlington,	S.C.)													
Greenville,	S.C.)													
Greensboro,	N.C.)	1366	87	78	72		12.7	11.4	10.5		15.9	20.0	26.4	
Greenville,	N.C.)													
Roanoke,	Va.)													
Suffolk,	Va.)													
Wilmington,	N.C.	1374	89	80	74		13.0	11.6	10.8		16.2	20.4	26.9	

Comparative Statement of Distances, Rates and Earnings to Houston and Representative Destinations in Southern Territory From The Following Oklahoma Origins Representative of Origin Group No. 7660, as Published in Southwestern Lines' Tariff No. 208-G, I.C.C. No. 3370:

Altus

Frederick

Mangum

[illegible]

(2) Average
Shortline
Distance
(Miles)

Rates

Average Earnings

MTM

CCM

To			Rates				MTM				CCM			
			Col. 1	Col. 2	Col. 3	Col. 4	Col. 1	Col. 2	Col. 3	Col. 4	Col. 1	Col. 2	Col. 3	Col. 4
Dublin, Ga.)	1122		78	69	63		13.9	12.3	11.2		17.4	21.5	28.1	
Elberton, Ga.)														
Kingsport, Tenn.)	1131		78	69	63		13.8	12.2	11.1		17.2	21.4	27.9	
Morristown, Tenn.)														
Augusta, Ga.	1188		80	71	65		13.5	12.0	10.9		16.8	20.9	27.4	
Brunswick, Ga.	1190		84	75	69		14.1	12.6	11.6		17.6	22.1	29.0	
Columbia, S.C.)														
Charlotte, N.C.)	1265		82	73	67		13.0	11.5	10.6		16.2	20.2	26.5	
Darlington, S.C.)														
Greenville, S.C.)														
Greensboro, N.C.)	1449		87	78	72		12.0	10.8	10.0		15.0	18.8	24.8	
Greenville, N.C.)														
Roanoke, Va.)	1435		90	81	75		12.5	11.3	10.5		15.7	19.8	26.1	
Suffolk, Va.)														
Wilmington, N.C.	1447		89	80	74		12.3	11.1	10.2		15.4	19.4	25.6	

EXPLANATION

Col. 1	-	Minimum weight	25,000	pounds
Col. 2	-	"	35,000	"
Col. 3	-	"	50,000	"
Col. 4	-	"	65,000	"

MTM - Mills ton mile

CCM - Cents car mile

Authority for rates - Southwestern Lines' Tariff No. 208-G, I.C.C. No. 3370.

(1) Average distance and average rates taken from Exhibit No. 33.

(2) Except as explained in (1) average distances compiled from distances shown in Exhibit No. 34.

APPENDIX "C"

Reproduction of Exhibit 27 in the Commission's
proceedings (introduced at R. 253)

(The first two blocks show the present and the proposed
rule in the transit tariff; the last two blocks show the
present and the proposed rule in the carload rate tariff.)

"LOADING RULES ON COTTON AT OKLAHOMA POINTS

"Present and Proposed Reading of Suspended Items
Agent J. R. Peel's I. C. C. Nos. 3307 and 3370

(Proposed changes are in italics)

"Item No. Present Reading

325 Peel's CHARGES FOR SHIPMENTS LOADED BY CARRIERS
ICC 3307. On cotton reshipped from concentration
points under carload rates, a loading charge
of 5½ cents per square bale and 2½ cents per
round bale will be assessed on shipments of
cotton moving into concentration points on
basis of inbound rates published in Item
390,²⁴ if the cotton was loaded at points of
origin by the carrier after tender at its
depot or cotton platform.
The loading charge will be in addition to
the through rate and will be collected when
charges are readjusted under the provisions
of Item 220 herein, unless the charge is paid
at point of origin.

(Non-pertinent note omitted)

²⁴ Brief writer's note: These are the "float-in" rates which apply on
the move from the original shipping point to the transit point.

Item No.	Proposed Reading
325-B Supplement No. 18 to Peel's ICC 3307	<p>CHARGES FOR SHIPMENTS LOADED BY CARRIERS</p> <p>On cotton reshipped from concentration point under earload rates, a loading charge of 5½ cents per square bale and 2½ cents per round bale will be assessed on shipments of cotton moving into concentration points on basis of inbound rates published in Item 390, if the cotton was loaded at points of origin by the carrier after tender at its depot or cotton platform (<i>See Exception</i>). The loading charge will be in addition to the through rate and will be collected when charges are readjusted under the provisions of Item 220 herein, unless the charge is paid at point of origin.</p>

(Non-pertinent note omitted)

EXCEPTION—Applicable only at points in Oklahoma on the AT&SF, GC&SF, P&SF, or M-K-T or KCS or Okla Ry and only on shipments to Beaumont, Corpus Christi, Galveston, Houston, Orange, Port Arthur or Texas City, Texas or Lake Charles, La.

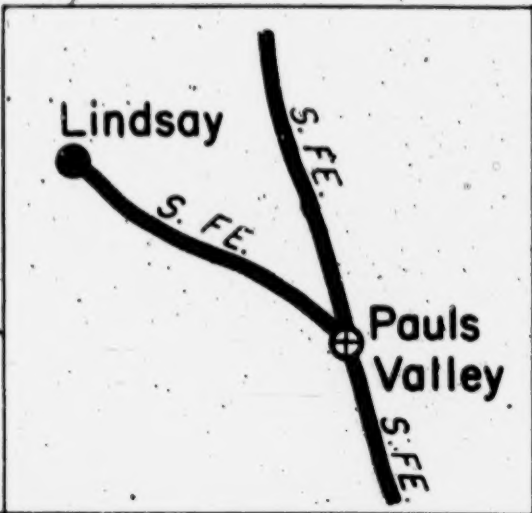
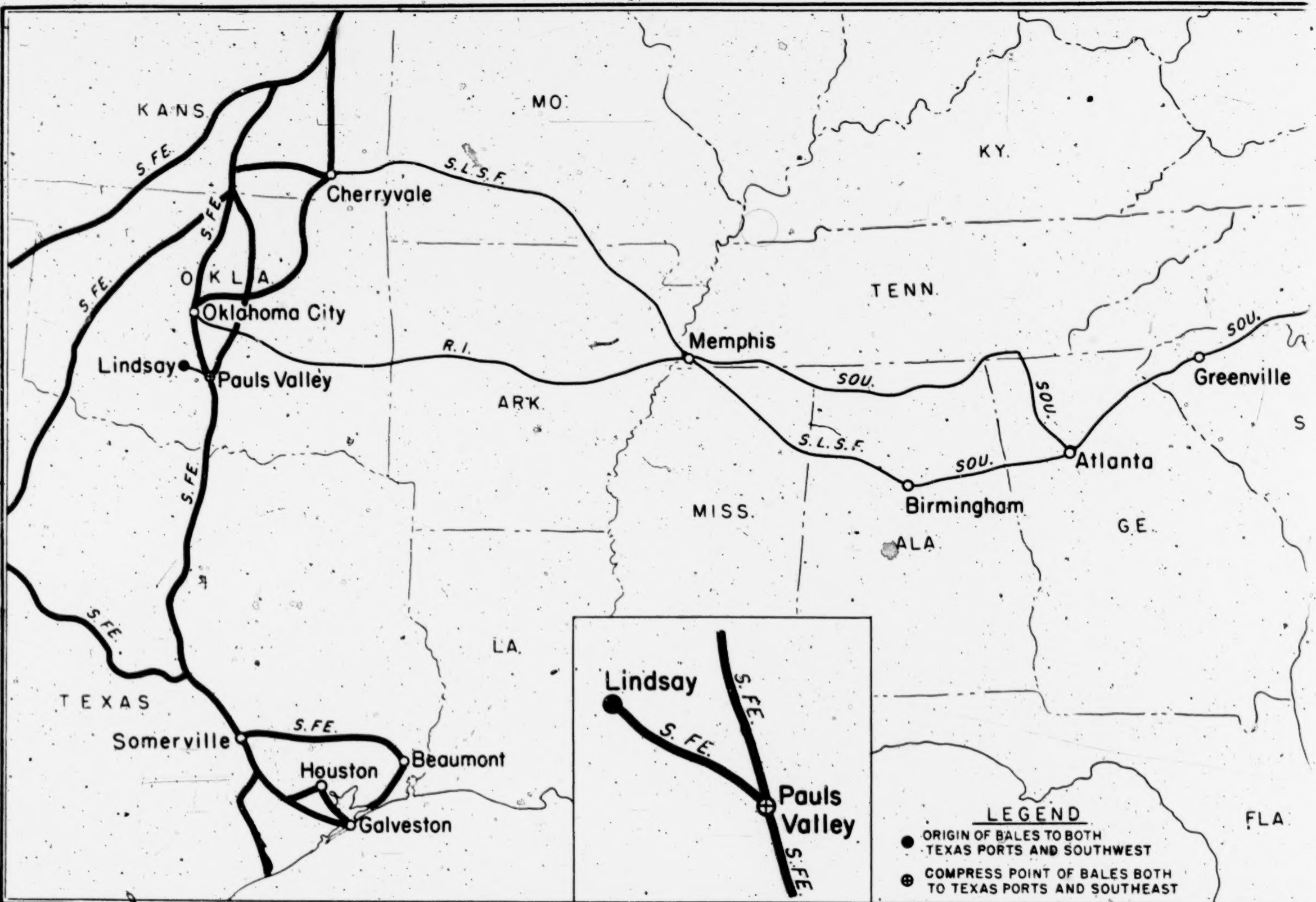
When cotton is tendered to carrier at origin on its depot or cotton platform, such shipment will be loaded by or at the expense of the carrier.

APPENDIX "C"—page 2

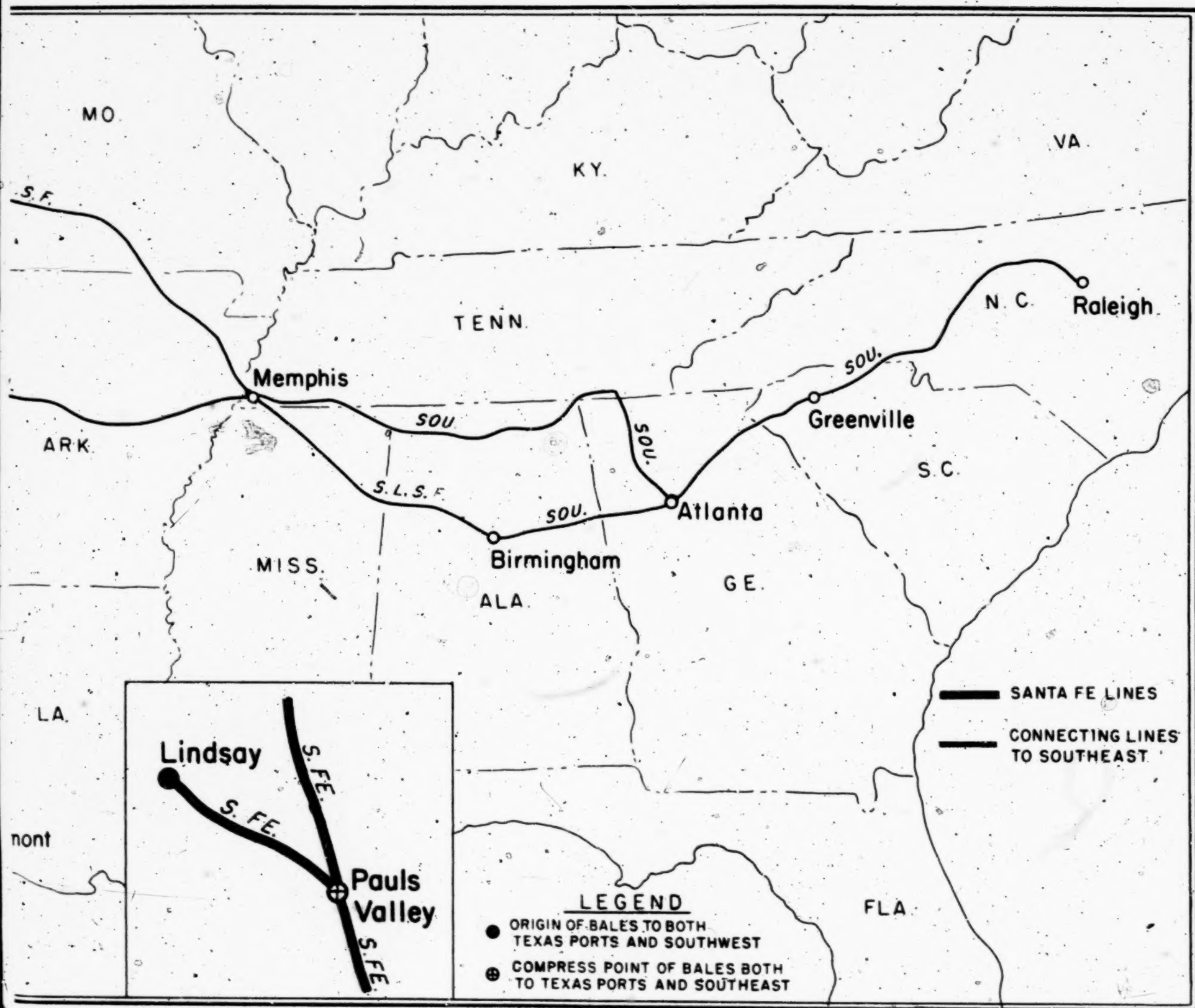
Item No.	Present Reading
120 Peel's ICC 3370	<p>CHARGES FOR SHIPMENTS LOADED BY CARRIERS</p> <p>Shipments moving for compression and (or) consolidation in transit under the provisions of Item 200 will be loaded at point of origin by the carrier, when tender is made at carrier's depot or cotton platform, at a charge of 5½ cents per square bale and 2½ cents per round bale.</p> <p>This loading charge will be in addition to the through rate and, upon request of shipper, may follow shipment as an advance charge, such advance charge to be inserted in the original bill of lading.</p>

Item No.	Proposed Reading
120-A Supplement No. 12 to Peel's I.C.C. 3370	<p>CHARGES FOR SHIPMENTS LOADED BY CARRIERS</p> <p><i>Except as provided in Item 121.</i> Shipments moving for compression and (or) consolidation in transit under the provisions of Item 200 will be loaded at point of origin by the carrier, when tender is made at carrier's depot or cotton platform, at a charge of 5½ cents per square bale and 2½ cents per round bale. This loading charge will be in addition to the through rate and, upon request of shipper, may follow shipment as an advance charge, such advance charge to be inserted in the original bill of lading.</p>

121A Supplement No. 12 to Peel's I.C.C. 3370	<p><i>Loading of cotton at stations in Oklahoma.</i></p> <p><i>Applicable only at points in Oklahoma on the AT&SF, GC&SF, F&SF, M-K-T or KCS or Okla Ry and only on shipments to Beaumont, Corpus Christi, Galveston, Houston, Orange, Port Arthur, or Texas City, Texas, or Lake Charles, La. When cotton is tendered to carrier at origin on its depot or cotton platform; such shipment will be loaded by or at the expense of the carrier.</i></p>
--	--



- LEGEND**
- ORIGIN OF BALES TO BOTH TEXAS PORTS AND SOUTHWEST
 - ⊕ COMPRESS POINT OF BALES BOTH TO TEXAS PORTS AND SOUTHEAST



REPLY BRIEF
FOR THE
APPELLANT

FILE COPY

Office - Department of Justice, U. S.

RECEIVED

MAR 1 1943

CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 520

L. T. BARRINGER AND COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION, THE ATCHISON,
TOPEKA AND SANTA FE RAILWAY COM-
PANY, *et al.,*

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TENNESSEE.

REPLY BRIEF ON BEHALF OF APPELLANT.

LUTHER M. WALTER,
JOHN S. BURCHMORE,
NUEL D. BELNAP,

Counsel for Appellant.

TABLE OF CONTENTS.

	PAGE
The opposing contentions.....	2
The application and construction of the statute....	3
Section 2 prohibits a difference in charges for identical loading services despite a difference in ultimate destinations	3
The Commission was not entitled under Section 3(1) to consider the alleged differences in the relative levels of the respective line-haul rates as a circumstance which justified or excused the undue preference and prejudice occasioned by the difference in loading charges.....	12
The lack of essential findings.....	18
The lack of evidence.....	21
Conclusion	22

CASES CITED.

	PAGE
Absorption of Switching Charges. (1929), 153 I. C. C. 595	9
Absorption of Switching Charges (1929), 157 I. C. C. 129	9
Alton & S. R. R. v. United States, 49 F. (2d) 414.....	16
Atchison, Topeka & Santa Fe Railway Company v. United States, 232 U. S. 199.....	16
Birkett Mills v. D. L. & W. R. R. Co. (1927), 123 I. C. C. 63.....	7
Buffalo, Rochester & Pittsburgh Ry. v. Pennsylvania Co. (1913), 29 I. C. C. 114.....	10
Bunker Hill Co. v. N. P. Ry. Co., 129 I. C. C. 242....	5
Butterfield Co. v. N. O. & N. E. R. R. Co. (1919), 55 I. C. C. 741.....	9
Cane Sugar from Wisconsin to Minnesota, 203 I. C. C. 373	5
Capital City Gas Co. v. Central & Rutland Co., 11 I. C. C. 104.....	5
Cattle Raisers' Assn. v. Fort Worth & D. C. Ry. Co. (1898), 7 I. C. C. 513.....	11
Central Railroad Co. of New Jersey v. United States, 257 U. S. 247.....	7, 14, 16
Chamber of Commerce v. S. A. L. Ry. (1917), 44 I. C. C. 455	6
Fitchburg Gas & Electric Co. v. Boston & M. R. (1930), 164 I. C. C. 487.....	9
Fort Smith Traffic Bureau v. St. L. S. F. R. R. Co., 13 I. C. C. 651.....	5
Interstate Commerce Commission v. Chicago, B. & Q. R. Co., 186 U. S. 320.....	17
Interstate Commerce Commission v. Stickney, 215 U. S. 98	13
Lawrenceville Cooperage Co. v. A. C. Ry. Co., 226 I. C. C. 773.....	5
Manufacturers R. Co. v. United States, 246 U. S. 457	6

	PAGE
Merchants Warehouse Co. v. United States, 283 U. S. 501	12
Miller Waste Mills v. C. M. St. P. & P. R. Co., 226 I. C. C. 451	5
Missouri Pacific R. R. Co. v. Reynolds-Davis Grocery Co., 268 U. S. 366	9
National Dock & Storage Warehouse Co. v. B. & M. R. R. (1916), 38 I. C. C. 643	9
Pacific Lbr. Co. v. N. W. P. R. R. Co., 51 I. C. C. 738	5
Pacific States Butter Assoc. v. Southern Pacific Co., 151 I. C. C. 244	16
Pennsylvania Co. v. United States, 236 U. S. 351	10
Perishable Freight Investigation, 56 I. C. C. 449	16
Richmond Chamber of Commerce v. S. A. L. Ry. (1917), 414 I. C. C. 455	5-6
Seaboard Air Line Railway Co. v. United States, 254 U. S. 57	6
Southern Roads Co. v. G. H. & S. A. Ry. Co. (1928), 140 I. C. C. 413	9
Standard Oil Co. v. Director General, 87 I. C. C. 214	5
Switching Absorptions (1917), 47 I. C. C. 583	9
Tide Water Oil Co. v. Director General (1921), 62 I. C. C. 226	6
United States v. Chicago & Alton Ry. Co., 148 Fed. 646	16
Wight v. United States, 167 U. S. 512	4

STATUTES.

Interstate Commerce Act, Part I:

Section 2	2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 16, 21
Section 3(1)	3, 11, 13, 14, 16, 19, 21
Section 1(5)(a)	16
Elkins Act (Title 49, U. S. C. Sec. 41-43)	16

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 520

L. T. BARRINGER AND COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION, THE ATCHISON,
TOPEKA AND SANTA FE RAILWAY COM-
PANY, *et al.*,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TENNESSEE.

REPLY BRIEF ON BEHALF OF APPELLANT.

Appellant's principal brief is believed to be sufficient to show the error in most of the contra arguments advanced by appellees. Consequently, this reply brief is limited to a clarification of the questions in dispute and to answering such contentions of appellees as were not anticipated in the principal brief and which appear to require answer.

THE OPPOSING CONTENTIONS.

As to Section 2. The Government and the Commission concede that "if the Commission based its conclusion under Section 2 on the fact that there was a difference in motor-truck competition and in the levels of rates on the respective line-hauls, it was considering factors which it was not legally entitled to consider." (Br. 12, 24) Appellees support the order on the theory that Section 2 has no application, as a matter of law, to a difference in separately stated loading charges for identical loading services, *unless* the line-haul services rendered on the cotton after loading are also identical as to final destinations and routes. (Gov. Br. 24 *et seq.*; R. R. Br. 12, *et seq.*) While there is no finding in the report to show that the Commission pitched its order on the ground just stated, appellant agrees with appellees (Gov. Br. ~~25~~ 26; R. R. Br. 35-36) that such an omission is immaterial if appellees are correct in their construction of the statute.

These concessions narrow the disputed question under Section 2 to whether the difference in destinations to which the cotton is reshipped under transit makes the section wholly inapplicable to the case.

If the question of statutory construction is so limited, it would then appear that all questions as to the adequacy of the findings or of the evidence to support the ultimate conclusion and order of the Commission under Section 2 are eliminated from the case. That is to say, if the Commission had no right to consider either the alleged difference in truck competition or the alleged difference in the relative levels of the respective line-haul rates in passing upon the Section 2 issue, its order is not aided by any findings or evidence as to those matters, but must stand or fall on the single question of statutory construction above stated.

As to Section 3. The parties agree that the Commission in reaching its conclusion under Section 3(1) was entitled to consider differences in the matter of truck competition, although they differ as to whether the order is supported by an adequate and relevant finding in regard thereto. Appellant urges that the particular difference in truck competition mentioned in the report (from the compress to final destination and not from the gin origin, where the loading occurs, to any destination other than the compress) has no relevancy to, or connection with, the service of loading at the gin origin, although appellant concedes that the evidence supports the irrelevant statements as to this matter found in the report.

As to the alleged difference in the relative levels of the respective line-haul rates as a legitimate consideration under Section 3(1), the contentions of the appellant, all of which are opposed by the appellees, are: (1) the recital of the Commission is not a finding and, if considered a finding, is without either significance or meaning; (2) the evidence does not support the recital; and (3) the Commission was not legally entitled to consider a more favorable adjustment of line-haul rates to the Southeast than to the Texas ports as offsetting the difference in separately established loading charges of which appellant complains, so as to excuse the undue prejudice and preference occasioned thereby.

THE APPLICATION AND CONSTRUCTION OF THE STATUTE.

SECTION 2 PROHIBITS A DIFFERENCE IN CHARGES FOR IDENTICAL LOADING SERVICES, DESPITE A DIFFERENCE IN ULTIMATE DESTINATIONS.

Appellees contend, as a matter of law, that Section 2 does not apply to a difference in separately stated loading charges *unless* the traffics subject to the different

charges are transported in line-haul service from the same origin, to the same destination, over the same line. In support they cite *Wight v. United States*, 167 U. S. 512, as holding that Section 2 applies to a difference in charges for identical terminal services "only" when the line-haul services are likewise identical. (Gov. Br. 24; R. R. Br. 12) However, there is nothing in the opinion of this Court in the *Wight* case to justify the use of the word "only". The line-haul services were identical in that case and a Section 2 violation was found. That case did not involve the question as to how Section 2 should be applied if the line-haul services had been different, and this Court did not go beyond the issues of the case.

Furthermore, the *Wight* case bears no analogy to the instant case as to the point under discussion. In that case no tariff provided for a drayage service or allowance to any shipper; the tariff before this Court did provide the line-haul rates. In the case of the favored shipper, the line-haul rate was reduced, without tariff authority, by $3\frac{1}{2}$ cents per 100 pounds through the device of a cartage allowance. No similar departure from the tariff was made for the competing shipper. Consequently, those shippers paid different charges for line-haul services and in such a case it was appropriate for this Court to emphasize the fact that the line-haul services were identical. The heart of that case was in the fact that there was an unauthorized reduction, definite and measureable, in the published line-haul rate for the favored shipper and no corresponding reduction in the line-haul rate paid by a competitor for an identical line-haul service. As is correctly said in the brief of the railroad appellees (Br. 13): "The conviction was sustained by this Court because the Baltimore & Ohio, in effect, charged Bruening only $11\frac{1}{2}$ cents for the same line-haul transportation for which it charged

Wolf the full 15 cents." The Government is in error in saying (Br. 29): "That was not a case where the service involved was actual carriage over the railroad * * *."

In the instant case, however, the charges and services involved are separate in fact, and by tariff, from the line-haul rates and services. The amended tariff made no change in the line-haul rates either to the Southeast or to the Texas ports. Shippers continue to pay the same line-haul rates in their entirety as were in effect before the tariff was amended. However, under the amended tariff, the loading service on cotton when ultimately reshipped to the Texas ports becomes free, although the separate tariff charge is continued on the traffic of appellant receiving an identical service. These facts bring into play the Section 2 prohibition against a difference in charges "for any service" regardless of the difference in ultimate destinations.

Appellees also cite a number of cases in which the Commission has said in substance that Section 2 applies only when identical line-haul services are involved. The majority number of such cases, noted in the margin,² involved only charges for line-haul services; and the holding of the Commission in those cases is obviously without pertinency to the different question involved in the instant case.

In another group of cases cited by appellees (*Richmond*

¹ The Government and the Commission characterize the service as "free" on pages 20 and 21 of brief.

² The cases cited as to line-haul rates include: *Bunker Hill Co. v. N. P. Ry. Co.*, 129 I. C. C. 242; *Cane Sugar from Wisconsin to Minnesota*, 203 I. C. C. 373; *Capital City Gas Co. v. Central & Rutland Co.*, 11 I. C. C. 104; *Fort Smith Traffic Bureau v. St. L. S. F. R. R. Co.*, 13 I. C. C. 651; *Laurenceville Cooperage Co. v. A. C. Ry. Co.*, 226 I. C. C. 773; *Müller Waste Mills v. C. M. St. P. & P. R. Co.*, 226 I. C. C. 451; *Pacific Lbr. Co. v. N. W. P. R. R. Co.*, 51 I. C. C. 738; *Standard Oil Co. v. Director General*, 87 I. C. C. 214.

Chamber of Commerce v. S. A. L. Ry. (1917), 44 I. C. C. 455, 466, and *Tide Water Oil Co v. Director General* (1921), 62 I. C. C. 226, 227), the Commission found Section 2 inapplicable to the failure of a line-haul carrier to absorb the switching charge of a terminal line on traffic from one origin while contemporaneously absorbing the same switching charge on traffic from another origin, it being held that the difference in origins was sufficient to take such a case entirely out of Section 2. Appellees argue that the difference in the loading charges complained of by appellant is analogous to the difference in absorption practices involved in the cases cited.

No court case is cited on the point,³ and there is no issue in this case which requires the Court to decide what the rule ought to be in the case of switching absorptions.

³ In *Seaboard Air Line Railway Co. v. United States*, 254 U. S. 57, this Court sustained a Section 2 order of the Commission which related to differences in switching absorptions as to traffic from a common origin and over the same line. That case did not involve the question of how the statute should be applied to a difference in absorptions as to traffics from different origins. In *Manufacturers E. Co. v. United States*, 246 U. S. 457, cited by the Government on the question of findings (Br. 18) this Court sustained an order of the Commission which declined to find that Section 2 was violated by a difference in absorption practices, although neither the Commission nor this Court rested the decision in that case on any difference in line-haul services. In that case, a terminal switching line at St. Louis, Mo., referred to as the Railway, and various shippers served by it, complained under Section 2 because its charges were not absorbed, although contemporaneously the same line-haul carriers absorbed the charges of the Terminal Railroad Association in the same area. The Commission found that such a difference in absorption practices was not in violation of Section 2. In sustaining the order, this Court pointed to the fact (p. 482) that the reports of the Commission disclosed a difference in the matter of the physical services for which the respective switching charges were assessed, making specific mention "of the different conditions of location, ownership, and operation as between the Railway and the Terminal." However, the inapplicability of Section 2 was not predicated on a difference between the line-haul services received by the traffic on which the switching charges were absorbed and the line-haul services received by the traffic on which the switching charges were not absorbed.

However, conceding, *arguendo*, that the Commission correctly construed Section 2 as prohibiting differences in switching absorptions *only* where the traffics receive the same line-haul services, it does not, perforce, follow that Section 2 is inapplicable to this case. See *Birkett Mills v. D. L. & W. R. R. Co.* (1927), 123 I. C. C. 63, 65, decided long after the Commission cases relied upon by the appellees. The Government suggests, without referring to it by name, that the *Birkett* case was disposed of as a factual case in which the Commission exercised its administrative discretion to exclude from consideration the differences in line-haul services instead of holding that such differences must be excluded as a matter of law. (Br. 30) The excerpt from the decision quoted in the margin shows the Government to be in error.⁴

A difference in the absorptions which one carrier makes of the switching charge of another carrier has no similarity, insofar as the application of Section 2 is concerned, to a difference in the charges which a carrier assesses for identical loading services performed by it.

In the first place, when a carrier declines to absorb the switching charges of another carrier, it does not thereby collect more from the shipper than it would collect if the switching charge were absorbed. While the shipper pays more, his additional payment is to the switching carrier. Consequently, whether a carrier absorbs or does not absorb a switching charge, the amount which *that* carrier collects from the shipper remains constant, and the difference is

⁴ In that case the Commission said: "With respect to unjust discrimination, complainants also rely on the differing transit charges on ex-lake and all-rail traffic. They contend that, as the transit charges are separately established charges for distinct services, they must stand or fall as such. They refer to *Central R. R. Co. v. United States*, 257 U. S. 247, in which it was held that a transit charge is a local charge for which the carrier establishing it is alone responsible. We believe that complainants' position is sound and that, as the differing transit charges are for the same transit services at the same points by the same carriers, unjust discrimination under section 2 of the act exists."

entirely in the aggregate service covered by the amount (line-haul rate) so collected. However, in this case, the amounts collected from the shipper by the Santa Fe Railroad differ depending directly upon whether the loading service is performed free or whether the loading service is performed for a separately stated charge, and the service rendered by the Santa Fe is constant, in its parts and in the aggregate, in both cases. It is that difference in the amounts collected by the Santa Fe Railroad for identical loading services performed by it which is prohibited by Section 2.

In addition, a difference in line-haul services in a case involving a difference in absorption practices has a significance and effect which has no similarity to a difference in line-haul services in a loading charge case. To develop that distinction requires an analysis of the character and effect of a switching absorption.

The services rendered in a switching absorption case always involve two distinct services rendered by two distinct carriers; one, the line-haul service rendered by the line-haul carrier, and the other, the switching service rendered by the switching carrier. Invariably, two separate charges by two separate carriers are published for these two separate services. When the switching charge is absorbed, the line-haul carrier places in its own tariff a provision that the rate published by it to a particular destination will cover not only deliveries reached by its own lines, but also deliveries reached by the rails of the switching lines at the point. The tariff of the line-haul carrier further provides that the charges assessed by such switching lines for the switching services which they perform in reaching such latter deliveries will be paid for by the line-haul carrier out of its published line-haul rate. When a line-haul carrier so pays out of its rate the switching charge of another carrier, it is referred to as an "absorption".

In *National Dock & Storage Warehouse Co. v. B. & M. R. R.* (1916), 38 I. C. C. 643, 650, the Commission said:

"* * * So far as the shipping public is concerned the effect of a switching absorption is to establish a joint rate; the cancellation of an absorption is the withdrawal of a joint rate, leaving effective the higher aggregate of intermediate rates."⁵

The act of providing the equivalent of a joint rate is the act of the line-haul carrier. The switching line is not a party to the arrangement between the line-haul carrier and the shipper from whom the latter collect its tariff charges (the line-haul rate), although the switching line does act as the agent of the line-haul carrier in transporting the traffic from point of interchange to point of delivery. The legal effect of a switching absorption, as stated by this Court in *Missouri Pacific R. R. Co. v. Reynolds-Davis Grocery Co.*, 268 U. S. 366, is to extend the through line-haul rate to a delivery on the rails of the switching line and to make the switching line the agent of the line-haul carrier.⁶

⁵ To the same effect are *Switching Absorptions* (1917), 47 I. C. C. 583, 586; *Butterfield Co. v. N. O. & N. E. R. R. Co.* (1919), 55 I. C. C. 741, 743; *Southern Roads Co. v. G., H. & S. A. Ry. Co.* (1928), 140 I. C. C. 413, 414; *Absorption of Switching Charges* (1929), 153 I. C. C. 595, 597; *Absorption of Switching Charges* (1929), 157 I. C. C. 129, 132; *Fitchburg Gas & Electric Co. v. Boston & M. R.* (1930), 164 I. C. C. 487, 493.

⁶ In that case this Court said (Italics ours): "*The joint through rate covered delivery at the warehouse of the consignee. The bill of lading named Morgan's Louisiana & Texas Railroad & Steamship Company as the initial carrier, and the route designated therein named the Missouri Pacific as the last of the connecting carriers. Its lines enter Fort Smith, but do not extend to the consignee's warehouse. It employed the St. Louis-San Francisco to perform the necessary switching service. And it paid therefor \$6.30, the charge fixed by the tariff on file with the Interstate Commerce Commission. The switching carrier was not named in the bill of lading, and did not receive any part of the joint through rate. It was simply the agent of the Missouri Pacific for the purpose of delivery. The Missouri Pacific was the delivering carrier, and is liable as such.*"

With the foregoing considerations in mind, it is plain that when a shipper complains of a difference in absorption practices, his complaint is directed to the amount of the service covered by the line-haul rate and not to the amount of the charge for the switching service as such. Consequently, if a switching charge is absorbed on traffic from one origin but not from another, a complaining shipper cannot rely on Section 2 because the difference in origins results in a dissimilarity in the physical services covered by the rates against which the complaint is brought. However, in this case, the complaint is directed to the difference in the charges assessed by one carrier for identical loading services, and there is no complaint as to the line-haul rates, the latter not even being in issue.

In a case of a difference in switching charges collected, as such, by the same carrier for identical switching services, there is no authority which suggests that the traffic must be handled in identical line-haul services before that carrier can be found guilty of violating Section 2. We are unable to cite a case in which such a Section 2 violation has been found, simply because no case can be located in which a particular carrier maintained a difference between the switching charge assessed on traffic from one origin and the switching charge assessed on traffic from another origin, the switching services being identical in the two cases. However, we may cite by analogy *Buffalo, Rochester & Pittsburgh Ry. v. Pennsylvania Co.* (1913), 29 I. C. C. 114, in which an order of the Commission involving discrimination between connecting carriers was sustained in *Pennsylvania Co. v. United States*, 236 U. S. 351. In that case the Pennsylvania Railroad performed switching services at New Castle, Pa., for the Pittsburgh and Erie Railroad, the Erie Railroad, and the Baltimore &

Ohio Railroad for a uniform charge of \$2 per car. It declined to perform similar switching services for the complainant with whom it likewise had a connection at New Castle. That difference in treatment was held by the Commission to be discriminatory in violation of the provisions of Section 3 which prohibit discrimination as between connecting carriers. The order of the Commission was not restricted to the discrimination practiced in respect to traffic transported by the complainant between New Castle, on the one hand, and points served by the complainant in common with the favored railroads, on the other. Consequently, the order reached traffic as to which the distant origins and destinations were dissimilar. In sustaining that order, this Court declined to treat differences in circumstances and conditions unrelated to the physical switching services rendered as excusing the discrimination complained of.

The railroad appellees cite *Cattle Raisers' Assn. v. Fort Worth & D. C. Ry. Co.* (1898), 74 C. C. 513, 539, as holding that a difference in terminal charges does not constitute unjust discrimination under Section 2 unless the line-haul transportation is between the same points, over the same railroad, and in the same direction in both instances. (Br. 15, 24) However, in that case, the complaint was not directed to difference in terminal charges for identical services rendered at the same point; rather the complaint was addressed to the fact that a terminal charge was assessed at Chicago while a similar terminal charge was not assessed at other livestock markets. (p. 539). Obviously, such a case has no similarity to the instant case.

As stated, the Government and the Commission concede that if the Commission based its decision under Section 2 on the fact that there was a difference in the relative levels of the line-haul rates, it considered a factor which

it was not legally entitled to consider. (Br. 12, 26) Presumably, that concession is induced because this Court holds that differences in circumstances legally entitled to consideration under Section 2 do not include those which arise either before the service of the carrier begins or after it is terminated. Differences in the respective line-haul rates come within such excluded differences, since the only service of the carrier under consideration in this case is the service of loading. By analogy, if differences in line-haul rates are not entitled to consideration, a difference in the destinations to which those rates apply should be likewise excluded therefrom.

In our principal brief, we pointed out that this Court sustained a Section 2 order of the Commission relating to loading services in *Merchants Warehouse Co. v. United States*, 283 U.S. 501, 512, without considering whether the line-haul services were the same or different. The Government and the Commission seek to distinguish that case on the ground that "the complainants there were warehousemen rather than shippers." (Br. 30). Appellees overlook the finding of this Court that the complaining warehouse companies were persons within the meaning of that word as used in Section 2 (p. 512) and that such warehousemen were also consignors and consignees of the merchandise. The appellant here has a similar status.

THE COMMISSION WAS NOT ENTITLED UNDER SECTION 3(1) TO CONSIDER THE ALLEGED DIFFERENCES IN THE RELATIVE LEVELS OF THE RESPECTIVE LINE HAUL RATES AS A CIRCUMSTANCE WHICH JUSTIFIED OR EXCUSED THE UNDUE PREFERENCE AND PREJUDICE OCCASIONED BY THE DIFFERENCE IN LOADING CHARGES.

The railroad appellees urge that the Commission had a right to consider the relative levels of the line-haul rates on the ground that "relative profit to the carrier" from

This paragraph stricken because point eliminated from Government's brief after it was served informally in page proof form.

such *line-haul* rates is a circumstance which warrants a difference in the local *charges for loading*, it being also stated that "relative costs of service and profit to the company were factors which might properly be considered." (Br. 29) However, the contention that large profits from one charge may be offset by slight profits from another charge is in the face of the principle enunciated in *Interstate Commerce Commission v. Stickney*, 215 U. S. 98, which the railroad appellees do not attempt to distinguish insofar as the application of the rule thereof to a Section 3(1) case is concerned. (Br. 23-4)

Furthermore, the Government and the Commission admit that the consideration of the relative rate levels by the Commission was not predicated on any finding that "the Southeastern rates were necessarily relatively lower, so far as the net return which they brought to the carrier was concerned." (Br. 21) That admission could not be avoided since the record contains no evidence as to costs or profits, relative or otherwise, as to the line-haul rates and service.

The Government and the Commission seek to distinguish the *Stickney* case (Br. 30-1) on the ground that the principle thereof does not apply "where the same carrier, as here, assesses the terminal charge and the line-haul charge." However, the distinguishing circumstance, even if otherwise valid, is not in fact present in this case. The terminal (loading) charge is assessed and controlled by the railroad appellees for services performed by them for which no other carrier has any responsibility. While these same carriers participate in the line-haul rates to the Southeast, they do so in a very limited way. On page 9 of brief, the Government and the Commission say:

"* * * It is to be noted that none of these carriers serves the Southeast and that they do not have any

but a very short part of the line-haul on cotton from Oklahoma to the Southeast, as is shown by the map appended at the end of appellant's brief."

Furthermore, even if all of the line-haul rates applied entirely over the Santa Fe, that carrier must bring each individual charge in conformity with Section 3(1). The Act does not authorize a carrier to offset an unduly prejudicial charge for one service against an unduly preferential charge for some other service. Rather, it prohibits each individual undue prejudice and preference.

Additionally, it is not true that the terminal charge in the *Stickney* case was published and collected by a carrier different from the delivering line-haul carrier. The opinion of this Court is quite clear on that point.

Consequently, if the decision of the Commission under Section 3(1) is predicated on the proposition that the disparity in loading charges assessed by the Santa Fe is offset or justified by the fact that the Santa Fe and its connections to the Southeast publish line-haul rates which are lower than they should be as compared with the rates to the Texas ports, the rule of the *Stickney* case is plainly applicable as invalidating such action.

The applicability of that rule is emphasized by *Central Railroad Co. of New Jersey v. United States*, 257 U. S. 247. There this Court held that an accessorial service was local to the carrier which provided it and could not be considered as an integral part of the line-haul rate structure so as to make other carriers participating therein responsible, within the meaning of Section 3(1), for a difference in accessorial services and charges not maintained by them. The Government and the Commission seek to distinguish that case on the ground (Br. 33) that in the instant case (italics ours):

... * * The Commission did not purport to pass upon the validity of line-haul rates of connecting carriers not before it or to require any action from them with respect to *this local loading charge over which they had no control*. It merely looked to the respective line-haul conditions in determining whether the local loading charge of the carriers before it was discriminatory or prejudicial."

But the "look" which the Commission took was unwarranted unless the lawfulness of a disparity in local charges for loading was a responsibility of the connecting line-haul carriers. That is to say, unless the line-haul carriers to the Southeast can be held jointly responsible with the Santa Fe Railroad for the level and relationship of local charges for loading maintained by the latter, the Commission had no right to treat a more favorable line-haul adjustment on appellant's traffic, even if true, as an offset to an unfavorable adjustment of loading charges. We agree with the Government that "one carrier may not be made to suffer for the shortcomings of another." (Br. 30) Conversely, one carrier may not take an unfair advantage of a shipper in respect to one charge, because other carriers have granted him an unnecessary or unwarranted advantage in respect to some other charge.

The railroad appellees state (Br. 23) that the Southeastern lines "virtually control," i. e., are responsible for these local loading charges, on the ground that if the Southeastern lines were not satisfied with the manner in which the Santa Fe Railroad adjusted its loading charges, such Southeastern lines could withdraw from the joint rate structure. This Court has held very specifically that the right of connecting carriers to withdraw from a joint-rate structure does not constitute control, virtual or otherwise, over an accessorial service and charge maintained by another line with which they maintain joint rates.

Central Railroad Co. of New Jersey v. United States,
257 U. S. 247, 256, 258-9.

The railroad appellees argue that the prohibitions in the Act apply only to the aggregate charges collected from a shipper and do not apply independently to separately stated charges. *United States v. Chicago & Alton Ry. Co.*, 148 Fed. 646, is cited as holding "that the word 'rate' as used in the Interstate Commerce Act means the net costs to the shipper of the transportation of his property" and that such net costs cannot be determined without considering "all money transactions of every kind or character" between the carrier and the shipper. (Br. 19) Appellees overlook the fact that the case cited involved an indictment for rebating under the Elkins' Act (49 U. S. C., Sec. 41), which act uses the word "rate," and did not involve the construction of either Section 2 or Section 3(1) of the Interstate Commerce Act.

The appellees also rely on a number of cases involving refrigeration services and charges noted in the margin (Gov. Br. 31; R. R. Br. 20) in which it has been held that in determining the reasonableness of line-haul rates under Section 1(5)(a), the Commission has authority to fix a line-haul rate in consideration of the accessorial services covered thereby, and also has authority, in its discretion, to fix separately published reasonable charges for such accessorial services. Those cases have no bearing on the point under discussion for two good reasons.

In the first place, the primary issue in those cases was as to the lawfulness of the line-haul rates. No such

* *Atchison, Topeka & Santa Fe Railway Company v. United States*, 232 U. S. 199, 219-211; *Alton & S. E. R. v. United States*, 49 F. (2d) 414, 417-429 (N. D. Cal. statutory three judge court); *Pacific States Butter Assoc. v. Southern Pacific Co.*, 151 I. C. C. 244, 263-264; *Perishable Freight Investigation*, 56 I. C. C. 449, 461-465.

issue is involved in this case; in fact, the line-haul rates were not before the Commission.

In the second place, the amended tariff did not serve to reconstruct the line-haul rate so as to make it cover services not theretofore included thereunder. Rather, the amended tariff simply provided for a free loading service on cotton reshipped to the Texas ports. The prior line-haul rates contained nothing to cover the loading service, the charge therefor being separately stated. The line-haul rates were not changed when the loading charge was eliminated.

Under such circumstances the instant case is not one which involved the fixing of a reasonable line-haul rate so as to cover the loading service as well. In respect to this matter, the tariff change has a significance which is the converse of the change considered by this Court in *Interstate Commerce Commission v. Chicago, B. & Q. R. Co.*, 186 U. S. 320, 336-7. In that case, railroads serving Chicago had for years maintained a line-haul rate which covered not only line-haul services but also the terminal service of placing the loaded cars at the Union Stock Yards. On June 1, 1894, the carriers gave appropriate notice that thereafter the total charge to the shipper would be composed of the existing line-haul rate plus a \$2 per car charge for terminal services. This Court, speaking through Mr. Justice White, held the result of that tariff change was not the equivalent of separating the terminal portion out from the line-haul rate so as thereafter to have each service covered by its own separate charge; rather, the original line-haul rate continued to cover the terminal service so that the new terminal charge "was a mere addition to the sum of the terminal charge embraced in

⁸ The Government and the Commission characterize the service as "free" on pages 20 and 21 of brief.

the prior through rate." The analogy to the instant case is plain and distinguishes the cases cited in the margin (see footnote 7) relied upon by the appellees.

THE LACK OF ESSENTIAL FINDINGS.

As to the relative levels of the respective line-haul rates. Appellant asserts that the report of the Commission fails to disclose what is meant by the statement that rates to the Southeast are "relatively lower" than to the Texas ports. The Government and the Commission admit that the finding is not to be read as meaning the rates to the Southeast were relatively lower than to the Texas ports "so far as the net return which they brought to the carrier was concerned." (Br. 21) On the same page this is said:

"* * * Read in its context then, the phrase, 'relatively lower' can be given a clear and pertinent meaning, viz., that the gross rates to the Southeast were relatively lower to the shipper."

A table of rates shown on page 36 of the Government brief, which is taken from Exhibit 38 appended to appellant's brief, shows that the carload rates subject to a 50,000-pound minimum are 46 cents per hundred pounds to Houston, and 67 cents per hundred pounds to Columbia, S. C. The gross rate to the Southeast is thus shown to be actually *higher* than to the Texas ports and the disparity is increased when a charge of 5½ cents per bale is added to the Southeastern rates but not to the Texas port rates. Consequently, if the Commission meant what its counsel says it meant, it misstated the fact.

We think that counsel intended to say gross, as distinguished from net, *earnings per mile* rather than gross rates. Even if so considered, the finding has no pertinency to any issue in this case. It can hardly be a

sound rule to impose a loading charge on a long-haul shipment, but not on a short-haul shipment, simply because the line-haul rates, when properly constructed, are lower per mile on former than on the latter shipments.

As to truck competition. The briefs of the appellees suggest that they misunderstand our contention as to the failure of the report to support the ultimate conclusion under Section 3(1) by an adequate finding as to a difference in truck competition. To make our position clear, we develop the point again.

The only finding in the report as to a difference in truck competition is directed to trucking from a compress (transit) point to ultimate destination. Appellant insists that the difference mentioned has no relation to the amended tariff because, if the purpose of the free loading at the gin origin is to meet truck competition, the competition so to be met is encountered in the haul from the gin origin to the compress point, rather than from the compress point to final destination. Further, free loading at gin origin cannot, as a practical matter, have any influence on whether a truck or a railroad will be used in the subsequent haul from compress point to final destination. This is made plain by the undisputed facts.

When the cotton is loaded at a gin, neither the shipper nor the railroad has any idea as to where it may go after concentration and compression at the compress point. The acute truck competition is encountered in connection with the move from the gin origin to the compress point (R. 117, 126, 128), and that competition is the same, regardless of ultimate destination of the cotton, which is not determined until later. (R. 136) The principal witness for the railroad appellees testified that the main purpose of the free loading was to stop the gin-to-compress trucking. (R. 123-4)

Unless the free loading attracts the cotton to the rails *at the gin origin*, it plainly affords no aid whatsoever in meeting truck competition. Certainly, unless it does attract the cotton to the rails at the gin origin, the free loading cannot influence the means of shipment from the compress. If the cotton moves from the gin to compress by truck, it will be reshipped from the compress point as "local" cotton, that is, not under transit, and the shipper is free to select a railroad or truck for the move to final destination. That selection could not be influenced in the slightest by the amended tariff since it does not apply to the cotton involved in that selection of routes. However if the free loading attracts the cotton to the rails at the gin, and thus takes it away from the trucks on the gin-to-compress move, its entire and only purpose has been attained. This is because any cotton which moves from gin to compress via rail is bound to be reshipped via rail from the compress, since, otherwise, the shipper is not in a position to secure a transit settlement and thereby recover all or a substantial part of the inbound charges paid.

It thus appears that a difference in the trucking competition from the compress point to ultimate destination has no relation to the amended tariff, nor is it a circumstance which affords a rational basis for the difference in loading charges at the gin origin. For that reason, the finding as to truck competition made by the Commission affords no support for the order of which appellant complains.

Incidentally, the railroad appellees mistakenly credit the report with a finding "that cotton is handled by truck from gin origins to compress stations *and interstate destinations*." (Br. 36) The statements in the report to which reference is made (R. 22-3) constitute no finding as to the handling of cotton from a gin origin to an inter-

state destination insofar as the movement by truck is concerned. The finding as to the cotton handled from gin origin to interstate destination relates only to the movement by railroad.

THE LACK OF EVIDENCE.

Under Section 2. No question of evidence now presents itself under Section 2 since the question for decision is wholly one of statutory construction.

Under Section 3. No question as to evidence in connection with the matter of truck competition is involved since appellant admits that the evidence supports the findings of the Commission although, as just stated, it contends that such findings are insufficient to support the order.

Insofar as the evidence relating to the relative levels of the line-haul rates is concerned, we are unable to follow the appellees in the theories advanced by them regarding the meaning of that evidence. At one place, the Government and the Commission say that this evidence shows (Br. 21) "that the gross rates to the Southeast were relatively lower to the shipper." At another place, the Government and the Commission say (Br. 37) (*italics ours*):

"* * * Here, however, the fact that the ton and car mile gross earnings are lower to the Southeast is not employed by the Commission in support of the proposition that there is anything unlawful about the level of the respective line-haul rates. Rather, it is used merely to show that *the rate level to the shipper was relatively lower* on the traffic to the Southeast. Plainly, this evidence as to car and ton mile earnings has probative value for that purpose and constitutes substantial evidence."

The rates to the Southeast are actually higher in cents per hundred pounds than to the Texas ports, and the

shipper pays rates in cents per hundred pounds and not in mills per ton mile or in cents per car mile. Consequently, we fail to understand how the evidence relied upon shows either that the gross rates to the Southeast are lower than to the Texas ports or that the rate level to the shipper was relatively lower.

The railroad appellees say (Br. 42) that record contains testimony from Witness Bee, the traffic expert for the Oklahoma Commission, "to the effect that rates to the Southeast are relatively more depressed than rates to the Texas ports in consideration of 'cost'." The testimony of Witness Bee quoted by the appellees (R. 247-8) is that "the same reductions in cents per hundred pounds were made to the Southeast, but not relatively as to cost. I wouldn't say." Wholly apart from the question of whether such an unsupported categorical statement is evidence at all, the statement quoted is hopelessly ambiguous since a failure to reduce a rate "relatively as to cost" may mean that the reduction was less than it should be as measured by relative costs or that it was more than it should be as measured by the same yardstick. That ambiguity can hardly be resolved since there is no evidence in the record as to transportation costs or as to any other circumstance or condition relating to the line-haul services other than the mere matter of distance.

CONCLUSION.

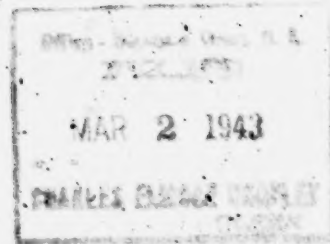
Appellant respectfully submits that the decree of the District Court should be reversed and the case remanded with directions to enter the injunction as prayed for.

LUTHER M. WALTER,
JOHN S. BURCHMORE,
NUEL D. BELNAP,

Counsel for Appellant.

FILE COPY

5



No. 520

In the Supreme Court of the United States

OCTOBER TERM, 1942

—
L. T. B. BRINGER AND COMPANY, APPELLANT

v. . . .

THE UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION, ET AL.

—
APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF TENNESSEE

—
BRIEF FOR THE UNITED STATES AND THE
INTERSTATE COMMERCE COMMISSION

INDEX

	Page
Opinions below.....	1
Jurisdiction.....	1
Questions presented.....	2
Statutes involved.....	3
Statement.....	4
Summary of argument.....	11
Argument:	
I. The findings of the Commission support its conclusions that the proposed tariffs violate neither Section 2 nor Section 3 (1).....	15
A. The Commission's report contains sufficient findings.....	15
B. It is apparent that Section 2 does not apply as a matter of law.....	24
C. The Commission's findings support its conclusion that there was no violation of Section 3 (1).....	26
II. The Commission, though considering a separately stated accessorial charge, was entitled to look to the respective line-haul conditions.....	28
III. There is substantial evidence to support the Commission's findings.....	34
Conclusion.....	37
Appendix.....	38

CITATIONS

Cases:	
<i>Alton & S. R. R. v. United States</i> , 49 F. (2d) 414.....	31
<i>Atchison, Topeka & Santa Fe Railway Company v. United States</i> , 232 U. S. 199.....	31
<i>Atchison, Topeka & Santa Fe Railway Company v. United States</i> , 295 U. S. 193.....	18, 22
<i>Board of Trade of Kansas City v. United States</i> , 314 U. S. 534.....	27, 28
<i>Bunker Hill & Sullivan M. & C. Co. v. N. P. Ry. Co.</i> , 129 I. C. C. 242.....	25
<i>Cane Sugar from Wisconsin to Minnesota</i> , 203 I. C. C. 371.....	25

(1)

II.

Cases—Continued.

Page

<i>Centrl. R. R. Co. of New Jersey v. United States</i> , 257 U. S. 247	32, 33
<i>General Utilities Co. v. Helvering</i> 296 U. S. 200	23
<i>Helvering v. Gowran</i> , 302 U. S. 238	26
<i>Hornel v. Helvering</i> , 312 U. S. 552	26
<i>Interstate Commerce Commission v. Alabama Midland Ry.</i> , 168 U. S. 144	26, 27
<i>Interstate Commerce Commission v. Del. L. & W. R. R.</i> , 220 U. S. 235	28
<i>Interstate Commerce Commission v. Stickney</i> , 215 U. S. 98	30
<i>Isbrandtsen-Moller Co. v. United States</i> , 300 U. S. 139	26
<i>Manufacturers Ry. Co. v. United States</i> , 246 U. S. 457	18, 22, 27, 28
<i>Meeker & Company v. Lehigh Valley R. R.</i> , 236 U. S. 412	18
<i>Miller Waste Mills, Inc. v. Chicago, M., St. P. & P. R. Co.</i> , 226 I. C. C. 451	25
<i>National Labor Relations Board v. Ford Motor Co.</i> , 114 F. (2d) 905, certiorari denied, 312 U. S. 689	23
<i>National Labor Relations Board v. National Motor Bearing Co.</i> , 105 F. (2d) 652	23
<i>New England Division's Case</i> , 261 U. S. 184	34
<i>Pacific Lumber Co. v. N. W. P. R. Co.</i> , 51 I. C. C. 738	25
<i>Pacific States Butter, Egg, Etc., Assoc. v. Southern Pacific Co.</i> , 151 I. C. C. 244	31
<i>Perishable Freight Investigation</i> , 56 I. C. C. 449	31
<i>Quarrah, A. & P. Ry. Co. v. United States</i> , 28 F. Supp. 916, affirmed, per curiam, 308 U. S. 527	18, 22
<i>Richmond Chamber of Commerce v. Seaboard Air Line Railway</i> , 44 I. C. C. 455	25, 29
<i>Riley Co. v. Commissioner</i> , 311 U. S. 55	26
<i>Rochester Telephone Corp. v. United States</i> , 307 U. S. 125	27, 33
<i>Seaboard Air Line Ry. Co. v. United States</i> , 254 U. S. 57	26, 30
<i>Southwestern Cotton</i> , 208 I. C. C. 677	5
<i>Standard Oil Co. v. Director General</i> , 87 I. C. C. 214	25
<i>Texas and Pacific Ry. v. Interstate Commerce Commission</i> , 162 U. S. 197	27
<i>Tide Water Oil Co. v. Director General</i> , 62 I. C. C. 226	25, 30
<i>United States v. Baltimore & Ohio R. R. Co.</i> , 293 U. S. 454	18
<i>United States v. Carolina Freight Carriers Corp.</i> , 315 U. S. 475	34
<i>United States v. Chicago Heights Trucking Co.</i> , 310 U. S. 344	27, 28
<i>United States v. Chicago, Milwaukee, St. P. and P. Ry. Co.</i> , 294 U. S. 499	23
<i>United States v. Louisiana</i> , 290 U. S. 70	18, 22, 23
<i>United States Box & Basket Co. v. White</i> , 296 U. S. 176	18, 22
<i>Western Chemical Co. v. United States</i> , 271 U. S. 268	31
<i>Wight v. United States</i> , 167 U. S. 512	24, 26

Statute:

Interstate Commerce Act, c. 104, Part I, 24 Stat. 379, as amended (49 U. S. C. 1-27):

Sec. 1 (1) (a)	38
Sec. 1 (3) (a)	28, 38
Sec. 1 (5) (a)	20, 30, 39
Sec. 2	3, 12, 13, 28, 40
Sec. 3 (1)	4, 12, 13, 40
Sec. 6 (1)	41
Sec. 15 (1)	42
Sec. 15 (7)	43

Miscellaneous:

H. Rep. No. 591, 59th Cong., 1st sess., p. 4	18
--	----

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 520

L. T. BARRINGER AND COMPANY, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF TENNESSEE

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

* OPINIONS BELOW

The *per curiam* opinion of the specially constituted district court, together with its findings of fact, conclusions of law, and final decree (R. 78-85), is not officially reported. The report of the Interstate Commerce Commission (R. 13-34) appears in 248 I. C. C. 643.

JURISDICTION

The final decree of the district court was entered on August 17, 1942 (R. 85). Petition for appeal was both presented and allowed on October

7, 1942 (R. 87-88, 93). Jurisdiction of this Court is invoked under the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219-221 (28 U. S. C. 47, 47a) and under Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936 (28 U. S. C. 345). Probable jurisdiction was noted by this Court on December 7, 1942 (R. 294).

QUESTIONS PRESENTED

The ultimate question is as to the validity of an order of the Interstate Commerce Commission issued in an investigation and suspension proceeding which sustained as not unlawful (*i. e.* not in violation of either Sections 2 or 3 (1) of the Interstate Commerce Act) a proposed change in the tariff charges for the loading of cotton at stations in Oklahoma served by the railroad appellees.¹ The proposed change eliminated an existing charge for loading cotton by the railroad appellees at the first origin, provided such cotton was subsequently reshipped under transit on car-load rates to various Texas-Gulf ports² or Lake

¹ Atchison, Topeka, and Santa Fe Railway; Gulf, Colorado, and Santa Fe Railway; Panhandle and Santa Fe Railway; Missouri-Kansas-Texas Railroad Company, and Kansas City Southern Railway. The change was also proposed by the Oklahoma Railway Company which did not intervene in this case. (See R. 109.)

² The term Texas-Gulf ports, as used herein, refers to the following Texas cities on the Gulf of Mexico: Beaumont; Corpus Christi, Galveston, Orange, Port Arthur, and Texas City.

Charles, Louisiana. The existing charge was continued, however, on the same cotton loaded at the same stations if subsequently reshipped under transit on carload rates to the Southeast. Subordinate questions are:

1. Whether the findings of the Commission support its conclusions that the proposed tariffs violate neither Section 2 nor Section 3 (1) of the Interstate Commerce Act.

2. Whether the Commission, though considering a separately stated accessorial charge, was entitled to look to the respective line-haul conditions.

3. Whether there is substantial evidence to support the Commission's findings.

STATUTES INVOLVED

The pertinent provisions of Part I of the Interstate Commerce Act (49 U. S. C. 1-27) are reproduced in the Appendix, *infra*, pp. 38-44. For convenience, Sections 2 and 3 (1) of the Act, which are the primary provisions here involved, are set forth in full at this point:

SEC. 2. If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives,

from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful (49 U. S. C. 2).

Sec. 3 (1). It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description (49 U. S. C. 3 (1)).

STATEMENT

The instant case presents the latest chapter in the history of the efforts of the railroads in recent years to meet the competition of motor trucks in securing cotton traffic. The history of this strug-

gle is well described in the present report of the Commission and in the report of the Commission in the so-called *Southwestern Cotton* case (*Cotton From and to Points in Southwest and Memphis*), 208 I. C. C. 677. The latter report is frequently referred to in the present report and affords the immediate setting for the present case.

For many years the carriers maintained only less than carload or any-quantity rates on cotton originating in the Southwest (R. 15). Under the any-quantity rates, as the term implies, the rate between two points is the same whether the quantity shipped is a single bale or a full carload. Under these rates the carriers performed all necessary loading services without additional charge, as is customary with less than carload freight. (R. 15.)

However, in order to meet truck competition, the railroads serving the Southwest (Texas, Arkansas, Oklahoma, Kansas, Missouri, and Louisiana) at various times in 1932 and 1933 established in addition a scheme of greatly reduced carload rates on cotton to various points, including the Texas-Gulf ports, Lake Charles, Louisiana, and southeastern mill points (R. 15, 18; *Southwestern Cotton* case, 208 I. C. C. 677, 680, 683). With some exceptions, these rates were generally approved by the Commission in the *Southwestern Cotton* case. This scheme of rates provides for the gathering of cotton in small quantities at cotton "gin origins" (country stations) into nearby

compress or transit points. From such points it is reshipped to ultimate destination in carload lots, subject usually to carload weight minima of 50,000 or 65,000 pounds. (R. 15, 22.) The purpose of the stop in transit at the compress point is to permit compression and consolidation so that the most favorable rate from a weight basis may be secured (R. 20). In most cases, including that of appellant, at the time of the initial shipment from the origin to the compress point, the railroads assess the full local or transit rate, sometimes known as a float-in rate (R. 15, 21). Later, when carload reshipment is made, the railroads collect the full local carload rate from the compress point to the final destination (R. 21). Under a so-called "transit" privilege, the shipper files a claim with the carrier and the aggregate inbound and outbound charges paid are readjusted; a refund is made so that the shipper is ultimately charged only the through carload rate from gin origin to final destination via the transit station (R. 15, 21).

Since these carload rates were substantially lower than the any-quantity rates, the carriers, at the time of the establishment of the carload rates and in connection therewith, imposed on the shipper the obligation of loading the cotton at the gin origins (R. 15-16). If the carriers loaded the cotton at the gin origins at the shippers' request, they imposed a charge therefor of 5.5 cents per square bale and 2.75 cents per round bale (R. 16). The rate governing the loading of cotton is car-

ried both in the tariff which publishes the through carload rates and in the tariff which provides the float-in rates and the transit privilege (R. 135). These loading charges are now generally collected at the time the transit claim is settled by deducting the charge from the transit settlement (R. 79, 184).

The Truck competition continued to increase, despite these reduced carload rates, particularly between Texas origins and the Texas-Gulf ports (R. 17). Effective October 15, 1939, the railroads serving Texas adopted a free loading policy under their carload rates (R. 17, 20). They published tariffs applicable on cotton traffic originating within the state of Texas which provided that the rail carriers would load cotton tendered to carriers at their depots or cotton platforms at Texas origins and would bear the expense of such loading (R. 17). Division 2 of the Commission refused, after protest against these tariffs, to suspend them, and the Railroad Commission of Texas granted authority to eliminate the loading charge on cotton, intrastate, effective October 28, 1939 (R. 17).

The carriers operating between Oklahoma and the various Texas-Gulf ports were also faced with truck competition (R. 17, 22). Reductions in through rates for the purpose of more adequately meeting truck competition were made applicable from the Southwest, including Oklahoma, on June 20, 1940, but the charge for loading in car-

load lots still annoyed the Oklahoma shippers who continued to increase their deliveries to trucks throughout 1940 (R. 22). To meet this competition, the railroads operating between Oklahoma and the Texas-Gulf ports (Atchison, Topeka, and Santa Fe; Gulf, Colorado, and Santa Fe; Panhandle and Santa Fe; Missouri-Kansas-Texas; and the Kansas City Southern, appellees here, and the Oklahoma Railway) filed with the commission tariffs to become effective June 11, 1941, proposing to cancel the aforementioned loading charge on shipments of cotton, in carloads, from Oklahoma to the Texas-Gulf ports and Lake Charles, Louisiana (R. 14, 17). The proposed change was to be accomplished by inserting the following exception in both the transit and the rate tariffs, which are set forth in Exhibit 27^a of the record before the Commission and reproduced in appellant's brief (pp. 57-59):

Applicable only at points in Oklahoma on the AT&SF, GG&SF, P&SF, or M-K-T or KCS or Okla Ry and only on shipments to Beaumont, Corpus Christi, Galveston, Houston, Orange, Port Arthur or Texas City, Texas or Lake Charles, La. When cotton is tendered to carrier at origin on its

^a By stipulation (cc. 293-294) it was agreed that the exhibits before the Commission, while certified as part of the record to this Court (R. 100), should not be printed, but might be referred to on brief or argument by either party as if printed.

depot or cotton platform, such shipment will be loaded by or at the expense of the carrier.

As is evident from this language, the free loading rule was applicable only to these points and did not cover shipments to the Southeast (R. 18). It is to be noted that none of these carriers serves the Southeast and that they do not have any but a very short part of the line-haul on cotton from Oklahoma to the Southeast, as is shown by the map appended at the end of appellant's brief.

Appellant, as appears from an affidavit executed by its president and introduced before the district court (R. 279-284), purchases cotton at Oklahoma gin and compress points located on the lines of appellee railroads and resells the cotton purchased by it to domestic mills located in the Southeast (Georgia, Alabama, South Carolina, and North Carolina). It pays or has paid for its account this loading charge, and it competes in purchasing in Oklahoma with cotton merchants who ship to the Texas-Gulf ports and who under this changed tariff policy are relieved from this loading charge (*ibid.*). In view of this situation, appellant on May 28, 1941, filed a petition with the Commission, under Section 15 (7) of the Interstate Commerce Act, to suspend these tariffs on the grounds that they were discriminatory and prejudicial to it and preferential to the Gulf port merchants, in violation of Sections 2 and 3 (1) of the Interstate Commerce Act (R. 4, 103-105).

Because of this and other protests, the Commission entered an order on June 11, 1941, (R. 11-12) suspending the effective date of the proposed change until January 11, 1942, and instituted investigation and suspension proceedings to ascertain the lawfulness thereof (R. 14). Subsequently, the carriers further deferred the effective date of the change until the proceedings should be concluded (R. 15). On January 29, 1942, the Commission, Division 3, after hearing, issued a report⁴ and order finding the proposed change not to be unlawful and vacating the order of suspension (R. 13-34). A petition for reconsideration by appellant was denied by the full Commission on April 13, 1942; and this tariff change became effective on April 21, 1942 (R. 6). Since appellant disputes just what the pertinent findings of the Commission were, they will be considered in the argument rather than here.

On May 11, 1942, appellant brought suit against the United States and the Commission in the District Court of the United States for the Western District of Tennessee to set aside the order (R. 80). The carriers involved, except the Oklahoma Railway, sought permission to intervene as defendants

⁴ This report was known as *Investigation and Suspension Docket No. 4981, Loading Cotton in Oklahoma*. It also embraced *Investigation and Suspension Docket No. 4996, Loading Cotton on St. L. S. F. and T. Railway in Texas*, which involved a proposal by the respondent therein to reestablish a loading charge in Texas. (R. 13.) This latter case is not now before this court.

and were permitted to do so by an order of June 29, 1942 (R. 60-65, 80-81). Final hearing was held before a specially constituted three-judge court on July 8, 1942 (R. 81). A certified copy of the oral testimony and documentary exhibits introduced in the proceedings before the Commission; and certain other documents considered by the Commission were received in evidence by the court (R. 81) which also received an affidavit filed by appellant solely for the purpose of showing appellant's standing to sue (R. 81). On July 17, 1942, the district court filed a *per curiam* opinion, findings of fact and conclusions of law (R. 78-85), and on August 17, 1942, a final decree dismissing the complaint was entered (R. 85).

SUMMARY OF ARGUMENT

I

The various recitals in the Commission's report afford ample basis for the district court's holding that the Commission found, *inter alia*, that there is (1) no trucking of cotton between points in Oklahoma and the Southeast whereas there is trucking of cotton between points in Oklahoma and the Gulf ports, (2) that the carload rates on cotton from Oklahoma origins to the Southeast are on a relatively lower basis than the carload rates from the same origins to the Gulf ports, and (3) that the rates from points in Oklahoma both to the Southeast and to the Gulf ports are depressed. These findings are obviously predi-

eated upon a finding, not specifically stated, that under the circumstances here, the Commission, in considering whether discrimination under Section 2 or prejudice under Section 3 (1) of the Interstate Commerce Act resulted from the practice with respect to the loading charges, was entitled to look to the respective line-haul conditions. Since it is the substance rather than the form of findings which controls, the Commission's report must be considered as containing this latter finding. We therefore submit that this Court is entitled to look at the line-haul conditions, and we ask the Court to take judicial notice of the fact that the respective line-hauls from Oklahoma to the Texas-Gulf ports and to the Southeast are to different destinations, for different distances, and in part over different railroads. In view of these circumstances, Section 2, as a matter of law, under numerous decisions of this Court and the Commission, has no application to this situation. Admittedly, it does not expressly appear from the report that the Commission applied this rule of law in considering the Section 2 issue. If the Commission reached its decision under Section 2 on the theory that there was a difference in truck competition or a difference in the relative level of the line-haul rates, it was considering factors which it was not authorized to consider in a Section 2 case. But since the Commission, as a matter of law, reached the right result, its decision must still be sustained under the settled rule. On

the other hand, on the issue of prejudice under Section 3 (1) of the Act, it has been held by this Court that the Commission is entitled to consider such elements as difference in competition and difference in the level of line-haul rates. Accordingly, the aforementioned findings afford ample support for the Commission's conclusion that the proposed change in the practice with respect to loading charges would not contravene Section 3 (1).

II

There is no statutory provision which requires the Commission, when considering whether a carrier's practice in levying or not a separately stated accessorial charge is discriminatory or prejudicial, to compare only the respective physical services performed under the accessorial charge. The decisions both of the Commission and of the courts, under Sections 2 and 3 (1), as well as under Section 1 (5) (a), establish rather that under such circumstances the Commission in an appropriate case is free to consider and compare the conditions surrounding the respective line-hauls. Whether in a particular case the line-haul conditions are to be considered is only one of the numerous factual determinations which the Commission is required to make in reaching its ultimate expert factual conclusion as to whether a discrimination or prejudice is "unjust" or "undue." If there is any rational basis therefor,

the Commission's exercise of discretion in this instance cannot be judicially disturbed. In the present case there is a rational basis for looking to the line-haul conditions, principally because under the particular tariffs the incidence of the loading charge is made to depend solely upon what particular place is the ultimate line-haul destination.

III

There is substantial evidence to support the Commission's findings both that there was a difference in truck competition on the respective line-hauls, and that the level of the rates to the Southeast was already lower. Appellant admits that the evidence shows a difference in the truck competition on the respective line-hauls from the compress points to the Gulf ports or to the Southeast, but it contends that the evidence shows no differences in truck competition between the points of origin and the nearby compress points. That, however, is immaterial, because the Commission based its decision on the theory that it was entitled to look to the line-haul conditions, and the findings relate to such conditions. The evidence by appellant's own admission was ample to support the finding that there was a difference in the truck competition met on the respective line-hauls. The abundant evidence as to difference in ton-mile and car-mile gross returns under the respective car-load rates to the Gulf ports and to the Southeast

affords ample support for the Commission's conclusion that the rates to the Southeast were already on a relatively lower basis.

ARGUMENT

I

THE FINDINGS OF THE COMMISSION SUPPORT ITS CONCLUSIONS ~~THAT THE PROPOSED TARIFFS VIOLATE~~ NEITHER SECTION 2 NOR SECTION 3 (1)

A. THE COMMISSION'S REPORT CONTAINS SUFFICIENT FINDINGS

The Commission's ultimate conclusion was as follows:

We, therefore, find that the elimination of the rail carriers' loading charge on cotton originating in Oklahoma on respondents' lines, compressed in transit and moving from compress point to Texas-Gulf ports and Lake Charles, La., at the earload rate from origin point, is just and reasonable and not shown to be otherwise unlawful (R. 31-32).

Appellant does not quarrel with this ultimate finding, admitting (Br. 26) that it is the equivalent of a finding that "the proposed change is not shown to be in violation of or prohibited by Section

The Commission stated in its report that "it has not been shown that any provisions of the Interstate Commerce Act would be violated if the suspended Oklahoma rule is permitted to become effective" (R. 30). Appellant had contended that the proposed tariffs would violate Sections 2 and 3 (1) (R. 4, 5, 8, 35).

2 or Section 3 (1)". Its objection rather is to an alleged lack of preliminary findings.

As has previously been pointed out (p. 11, *supra*), the district court held (R. 83) that the Commission had made, *inter alia*, preliminary findings that there was (1) no trucking of cotton between points in Oklahoma and the Southeast whereas there was trucking of cotton between points in Oklahoma and the Gulf ports, (2) that the carload rates on cotton from Oklahoma origins to the Southeast were on a relatively lower basis than the carload rates on cotton from the same origin to the Gulf ports, and (3) that the rates from points in Oklahoma both to the Southeast and to the Gulf ports were depressed.

We submit that the following excerpts from the Commission's report clearly establish that the Commission did make the above three subordinate findings:

The trucking of cotton to Texas-Gulf ports became acute in 1938-1939, particularly from Texas origins, as well as from country stations or gins to the compress points, usually some 50 miles distant. * * *

* * * Reductions in through rates for the purpose of more adequately meeting truck competition were made applicable from the Southwest, including Oklahoma, on June 20, 1940, but the charge for loading in carload lots still annoyed the Oklahoma

shippers who continued to increase their deliveries to trucks throughout 1940. * * *

* * * The reason for not providing for the absorption of the loading charge in Oklahoma on traffic destined to the Southeast is that the rates to the Southeast are already lower relatively than they are to the Texas ports. Besides, there is no trucking of cotton from Oklahoma to Memphis or to the Southeast. * * *

The competition with trucks in Texas was found to be greater to the Gulf ports than from Oklahoma points to the Gulf ports, but the competition with trucks at the country stations to the compress points is shown to be proportionately keen in both states. Regardless, however, of the fact that the rates to the Southeast are relatively lower than to the Texas-Gulf ports, respondents stand ready to make the same free loading rule applicable from Oklahoma to such southeastern destinations.

The pertinent facts are these: The car-load rates on cotton from Oklahoma to the Gulf ports and the Southeast are conceded by all parties to be below a reasonable maximum level, yet at the same time compensatory. This is affirmed in the *Southwestern Cotton case*. Some carriers feel that they must do something to retain the cotton traffic on their lines. They are using the free loading rule to assist them in retaining such traffic and at the same time attempting to

derive as much revenue as they can from the admittedly low level of rates now in effect on this traffic (R. 22, 23, 24, 30).

Appellant apparently urges that the Commission's report, despite this language, does not make satisfactory findings and does not make the aforementioned findings which the district court concluded it had, among others, made. This is completely to overlook the well settled rule that the Commission in connection with orders of this kind is not required to make formal and precise findings in the language which a court might use in making special findings of fact. *Meeker & Company v. Lehigh Valley R. R.*, 236 U. S. 412, 428; *Manufacturers Ry. Co. v. United States*, 246 U. S. 457, 487; *United States v. Louisiana*, 290 U. S. 70, 80; *United States v. Baltimore & Ohio R. R. Co.*, 293 U. S. 454, 465; see H. Rep. No. 591, 59th Cong., 1st sess., p. 4. It is also to overlook the principle that it is substance rather than form which is controlling with respect to the Commission's findings. *Manufacturers Ry. Co. v. United States*, *supra*; *United States v. Louisiana*, *supra*; *Quannah, A. & P. Ry. Co. v. United States*, 28 F. Supp. 916, 918 (N. D. Tex., statutory three-judge court), affirmed, *per curiam*, 308 U. S. 527; cf. *Pacific States Box & Basket Co. v. White*, 296 U. S. 176, 186; see Mr. Justice Stone's dissenting opinion, in which Mr. Justice Brandeis and Mr. Justice Cardozo joined, in *Atchison, Topeka & Santa Fe Railway Company v. United States*, 295 U. S. 193, 202.

These portions of the report, read together and in their entirety, plainly reveal that the Commission was not, as appellant charges, merely stating the contentions of the carriers, but was actually making the findings indicated.

Even assuming, as appellant further contends (Br. 30), that a finding cannot be considered as supporting an ultimate conclusion unless the report discloses the relation between the two, here the link is welded by the following finding^a in the Commission's report, which is the rationale of the decision (R. 31):

In the *Southwestern Cotton* case the Commission at page 724 said:

"The practices which may have prevailed in the past with respect to free transit are no criteria in the present circumstances. In the past there was substantially no unregulated competition and the rates were not depressed. If the carriers gave a free service in one instance it was not unreasonable to expect them to give it in another. Now the situation has changed. In the present circumstances it is not only the carriers' right but their duty to conduct their operations in the most economical manner possible, in order to retain the greatest net revenue out of the low competitive rates which they are compelled to charge. The fact that they have provided certain transit services without charge in

^a The district court concluded that this statement was a finding by the Commission (R. 83).

addition to the transportation rates, in instances where that seems to be good business policy from a competitive standpoint affords no basis for requiring them to assume the additional burden and expense incident to such services where the opportunities for corresponding benefits to them are lacking."

This was said with reference to the circumstances which distinguish the granting of transit in the interior but not at the ports. It applies with equal force to either of the situations presented in the proceedings now before us.

It is also asserted by appellant (Br. 29) that the phrase "relatively lower" (see p. 16 *supra*) as applied to the line-haul rates to the Southeast conveys no meaning. It is said that the appropriate finding under these circumstances should have been "that cotton to the Southeast does not pay as much for line-haul service as it ought to pay in relation to the Texas ports." The phrase suggested might have been appropriate in a case where the Commission was considering the reasonableness *inter se* of the line-haul rates to the Texas Gulf ports and the Southeast under Section 1 (5) (a). Here, however, the Commission was concerned instead with the issue of discrimination and prejudice.

By the phrase "either of the situations", the Commission meant the present situation and the converse situation presented in the companion docket, I. and S. 4996, wherein another railroad was seeking to reestablish the loading charge in Texas (R. 30):

In this connection, as the paragraph quoted immediately above indicates, the Commission thought the carriers should be furnishing additional free service under the already low line-haul rates only in cases where the greatest competitive advantage would be derived. Under this theory, whether the charges to the Southeast were already relatively lower, so far as the shipper was concerned, was of course pertinent because the carriers' failure to woo the southeastern shipper by free service would then be more justified, especially since there was no truck competition to that area. Read in its context then, the phrase, "relatively lower" can be given a clear and pertinent meaning, *viz*, that the gross rates to the Southeast were relatively lower to the shipper. As we shall show (pp. 35-36, *infra*), there is substantial evidence in the record to support the finding as so construed. While it is true that there is no finding that the Southeastern rates were necessarily relatively lower, so far as the net return which they brought to the carrier was concerned, that is immaterial in the present situation.

The above findings by the Commission with respect to the circumstances and conditions surrounding the respective line-hauls to the Southeast and to the Gulf ports, and the clear reliance upon such findings necessarily presuppose a finding of fact by the Commission that it was entitled under the circumstances of this case to consider the line-haul conditions even though it was specif-

ically dealing with a separately stated accessorial charge. It is true that the Commission's report does not contain such a preliminary finding in so many words. But the aforementioned findings are the complete and obvious equivalent of such a finding and they could not possibly have been made if the Commission had not in fact reached that conclusion. Under the rule that it is the substance rather than the form of findings which is controlling (*Manufacturers Ry. Co. v. United States*, 246 U. S. 457, 487; *United States v. Louisiana*, 299 U. S. 70, 80; *Quanah, A. & P. Ry. Co. v. United States*, 28 F. Supp. 916, 948 (N. D. Tex., statutory three-judge court), affirmed, *per curiam*, 308 U. S. 527; cf. *Pacific States Box & Basket Co. v. White*, 296 U. S. 176, 186; see Mr. Justice Stone's dissenting opinion, in which Mr. Justice Brandeis and Mr. Justice Cardozo joined, in *Atchison, Topeka & Santa Fe Railway Company v. United States*, 295 U. S. 193, 202), such a preliminary finding must be considered as having been made by the Commission. Furthermore, it would be

In this connection, see the following conclusion of law of the court below:

In determining whether or not the provisions of Sections 2 and 3 of the Interstate Commerce Act have been violated by the publication of the tariffs under consideration here, the Commission properly considered the dissimilarity in circumstances and conditions between the line-haul movement of cotton from Oklahoma origins to the southeast and the line-haul movement of cotton from Oklahoma points to the Gulf ports here involved (R. 81).

an idle gesture to remand the case to the Commission for a specific preliminary finding on this question because the Commission could not possibly, consistently with these other findings, enter a finding other than this, or one that would in any way assist appellant. This Court has held that it will not require such a futile remand. *General Utilities Co. v. Helvering*, 296 U. S. 200, 207; see *Manufacturers Ry. Co. v. United States*, *supra*; *United States v. Louisiana*, *supra*. See also *National Labor Relations Board v. Ford Motor Co.*, 114 F. (2d) 905, 912 (C. C. A. 6), certiorari denied, 312 U. S. 689; *National Labor Relations Board v. National Motor Bearing Co.*, 105 F. (2d) 652, 659 (C. C. A. 9).

We are well aware that the supplying of findings by implication in a report of the Commission is not to be countenanced under the rule of numerous cases. But here, because of the aforementioned findings, there is room for but one implication, and it is submitted that those cases are therefore inapplicable. Unlike the situation in those cases, to use the language of Mr. Justice Cardozo in *United States v. Chicago, Milwaukee, St. P. and P. Ry Co.*, 294 U. S. 499, 510, this is a situation where a "halting impression ripens into reasonable certitude." It is to be remembered also that one of the prime purposes of express findings in an administrative decision is that those affected will not be misled. But here appellant clearly un-

derstands that the Commission in effect made a finding of fact that it was under the circumstances entitled to consider the line-haul conditions. Its whole case is based on the alleged illegality of such action.

B. IT IS APPARENT THAT SECTION 2 DOES NOT APPLY AS A MATTER OF LAW.

Since the Commission in effect made the preliminary finding that it was proper under the circumstances to consider the conditions surrounding the respective line-hauls, we ask the Court to take judicial notice of the fact that the line-hauls to the Southeast and to the Gulf ports are to different destinations, for different distances, and in part over different railroads. This is of course evident from an examination of the map appended at the end of appellant's brief.

With this in mind, it is immediately apparent that Section 2 as a matter of law has no application to the present situation. It has been settled since an early time that this Section applies only where two shippers ship over the same line, the same distance, under the same circumstance of carriage. It was so held in 1897 in *Wight v. United States*, 167 U. S. 512, 517-518, where this Court said:

The wrong prohibited by the section is a discrimination between shippers. It was designed to compel every carrier to give equal rights to all shippers over its own road and to forbid it by any device to en-

force higher charges against one than another. * * * It was the purpose of the section to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor.

This was not a case where the service involved was the actual carriage over the railroad, but was like the present case where free accessorial service (there drayage) was rendered to one shipper but not to another. See also *Interstate Commerce Commission v. Alabama Midland Ry.*, 168 U. S. 144, 166.

The Commission has consistently held in accord with the *Wight* decision, that Section 2 does not apply where the line-hauls are not over the same line, for the same distance and to the same destination. *Richmond Chamber of Commerce v. Seaboard Air Line Railway*, 44 I. C. C. 455, 464-466; *Pacific Lumber Co. v. N. W. P. R. R. Co.*, 51 I. C. C. 738, 760; *Tide Water Oil Co. v. Director General*, 62 I. C. C. 226, 227; *Standard Oil Co. v. Director General*, 87 I. C. C. 214; *Bunker Hill & Sullivan M. & C. Co. v. N. P. Ry. Co.*, 129 I. C. C. 242, 246; *Cane Sugar from Wisconsin to Minnesota*, 203 I. C. C. 371, 376; *Miller Waste Mills, Inc. v. Chicago, M., St. P. & P. R. Co.*, 226 I. C. C. 451, 453. The first two of these cases also involved the validity of carrier practices whereby a separate

accessorial charge was absorbed in the line-haul rate for one shipper but not for another.

It is true that the Commission in its report does not specifically purport to base its conclusion under Section 2 on the foregoing rule of law. And if the Commission based its conclusion under Section 2 on the fact that there was a difference in motortruck competition and in the level of rates on the respective line-hauls, it was considering factors which it was not legally entitled to consider. *Wight v. United States*, 167 U. S. 512, 518; *Interstate Commerce Commission v. Alabama Midland Ry.*, 168 U. S. 144, 166; *Seaboard Air Line Ry. Co. v. United States*, 254 U. S. 57, 62. This, however, is immaterial, as long as the Commission reached the right result on any theory of law, which it manifestly did here. For the rule is now clearly established that if the decision of an administrative body, like that of a lower court, is correct on any legal ground, it must be affirmed on appeal even though the decision was actually based upon a different ground: *Helvering v. Gowran*, 302 U. S. 238, 245; *Riley Co. v. Commissioner*, 311 U. S. 55, 59; *Hormel v. Helvering*, 312 U. S. 552; see also *Isbrandtsen-Moller Co. v. United States*, 300 U. S. 139, 145.

C. THE COMMISSION'S FINDINGS SUPPORT ITS CONCLUSION THAT THERE WAS NO VIOLATION OF SECTION 3 (1)

Section 3 (1), the undue preference clause, is much broader than Section 2, the unjust discrim-

ination clause. It is well settled that, unlike the case under Section 2, the element of competition and all other factors which have a legitimate bearing on the situation may be considered⁹ by the Commission in ascertaining whether a prejudice is "undue." *Texas and Pacific Ry. v. Interstate Commerce Commission*, 162 U. S. 197, 218-220; *Interstate Commerce Commission v. Alabama Midland Ry.*, 168 U. S. 144, 166. What is an undue preference, as well as what is an unjust discrimination, is a question of fact confided to the judgment and discretion of the Commission. *Manufacturers Ry. Co. v. United States*, 246 U. S. 457, 481; *United States v. Chicago Heights Trucking Co.*, 310 U. S. 344, 352-353; *Board of Trade of Kansas City v. United States*, 314 U. S. 534, 546. The Commission's determination on such a question is not to be disturbed if there is any rational basis therefor. *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 145-146. Clearly the Commission's findings as to the differences in truck competition and in the relative level of rates on the respective line-hauls (R. 22, 23, 24, 30) were legitimate considerations and afford a rational basis for the conclusion reached under Section 3 (1) that there was no undue

⁹ Appellant admits this (Br. 46), but confines its argument on Section 3 (1) to the proposition that as a matter of law the Commission was required to consider only the immediate circumstances surrounding the loading service and not those surrounding the respective line-hauls. This proposition is believed to be incorrect (see pp. 28-34, *infra*).

preference—assuming that the Commission was entitled to consider the line-haul conditions at all (see pp. 28-34, *infra*).

11

THE COMMISSION, THOUGH CONSIDERING A SEPARATELY STATED ACCESSORIAL CHARGE, WAS ENTITLED TO LOOK TO THE RESPECTIVE LINE-HAUL CONDITIONS

Appellant urges (Br. 35-48) that as a matter of law the Commission was required under Sections 2 and 3 (1), when considering a separately stated accessorial charge, to look only to the physical conditions surrounding such charge and was precluded from looking to the line-haul transportation conditions. Our position is that there is no rule of law so limiting the Commission, and that the question is a factual one entrusted to the Commission's informed discretion, to be decided under the circumstances of each case as part of the Commission's general function in determining the admittedly factual ultimate question as to whether a discrimination or prejudice is unjust or undue. See *Manufacturers Ry. Co. v. United States*, 246 U. S. 457, 481; *United States v. Chicago Heights Trucking Association*, 310 U. S. 344, 352-353; *Board of Trade of Kansas City v. United States*, 314 U. S. 534, 546. We do not contend that the Commission is entitled to consider differences in circumstances not germane to transportation or which arise before or after the total transportation services began. Cf. *Interstate Commerce Commission v. Del. L. & W. R. R.*, 220 U. S. 235.

There is nothing in the express language of either Section 2 or 3 (1) which limits the Commission as appellant would do. The prohibition of Section 2 of course runs against the collection of a different charge "for any service rendered, or to be rendered, in the transportation of * * * property." But this merely means that it applies to accessorial services included in the broad definition of transportation in Section 1 (3) (a); in addition to actual carriage. For application of the prohibition, the service must still be rendered "under substantially similar circumstances and conditions," and nothing in the statute limits this latter phrase to the circumstances surrounding the particular accessorial service under consideration.

The Commission's decisions under Sections 2 and 3 (1) certainly do not support the proposition that when considering a separately stated accessorial charge the Commission is barred from considering line-haul conditions. The Commission has previously been faced with the problem as to whether it was discriminatory or prejudicial for a carrier to absorb in its line-haul rates for one shipper but not for another, the separately stated switching charges (accessorial) of another carrier. In those cases, it has examined the line-haul conditions with respect to the different shipments and has found discrimination or prejudice to exist or not depending upon whether or not the line-haul conditions were the same. *E. g., Richmond Cham-*

ber of Commerce v. Seaboard Air Line Railway, 44 I. C. C. 455, 462-466; *Tide Water Oil Co. v. Director General*, 62 I. C. C. 226. The Commission's conclusions in the former case, so far as they were presented to this Court, were specifically sustained in *Seaboard Air Line Ry. Co. v. United States*, 254 U. S. 57. These cases differ from the present one only in that the separate accessorial charge absorbed for one shipper in the line-haul rate was that of another carrier. No reason is apparent why that should make any difference.

There are, of course, instances, as appellant points out (Br. 38-39), where the Commission has not considered line-haul conditions in considering a separate accessorial charge. Not only are these cases distinguishable, but they serve to confirm the truth of our contention that whether line-haul conditions are to be considered is a factual question for the Commission's informed determination on the basis of all the circumstances.

Appellant also contends (Br. 42, 45, 47), in reliance upon *Interstate Commerce Commission v. Stickney*, 215 U. S. 98, that in determining the reasonableness of a separately stated terminal charge under Section 1 (5) (a) the Commission is not permitted to consider the line-haul charges. It is urged that by analogy the same rule should be applied under Sections 2 and 3 (1). The *Stickney* case merely holds, however, that where the terminal charges of one carrier are reasonable in themselves, such charges are not to be condemned because the

prior line-haul charges of a connecting carrier made the total rate unreasonable. The essential governing principle of that case is that one carrier may not be made to suffer for the shortcomings of another. In numerous cases both the Commission and the courts have specifically recognized that the *Stickney* case does not apply where the same carrier, as here, assesses the terminal charge and the line-haul charge. In these same cases it is further recognized that it is perfectly proper in determining the reasonableness under Section 1 (5) (a) of a carrier's separately stated accessorial charge (icing charge in these cases) to consider the line-haul freight rate and to determine whether elements of cost not provided for in the separate rate are in fact included in the line-haul rate: *Atchison, Topcka, & Santa Fe Railway Company v. United States*, 232 U. S. 199, 219-221; *Allon & S. R. R. v. United States*, 49 F. (2d) 414, 417-428 (N. D. Cal., statutory three-judge court); *Pacific States Butter, Egg, Etc. Assoc. v. Southern Pacific Co.*, 151 I. C. C. 244, 263-264; *Perishable Freight Investigation*, 56 I. C. C. 449, 461-465. These cases also hold that the language of Section 6 (1), upon which appellant relies (Br. 40), requiring the separate statement of terminal charges, does not prevent this result.

Consequently, if the Court adopts appellant's view that the same rule should be applied under Sections 2 and 3 (1) as is applied under Section 1 (5) (a), which we think it should, it will have no other course but to reject the construction of Sec-

tions 2 and 3 (1) now advanced by appellant. The plain truth of the matter is that whether a Section 1 (5) (a), 2 or 3 (1) issue is involved, the shipper can have no legitimate complaint unless the total assessed against him for *all* transportation charges is unfair compared with what others are assessed. Here, no such complaint can be maintained.

Finally, in this connection appellant asserts, on the authority of *Central R. R. Co. of New Jersey v. United States*, 257 U. S. 247, that the Commission was powerless to consider the line-haul rates because the connecting carriers who were parties to the through routes to the Southeast were not made respondents before the Commission. In that case the Commission had found a violation of Section 3 (1) because one carrier did not furnish the privilege of creosoting in transit to a creosoting company on its line, whereas other carriers with which it had joint tariffs did furnish such transit privilege at entirely different points to companies located on their lines. This Court held, however, that the granting or withholding of the transit privilege was a local practice solely within the control of the carrier on whose line it could be granted, and not within the control of other carriers who had joint tariffs with that particular carrier. Because the Court concluded that the preference there was not by the same carriers, and that Sec-

tion 3 (1) condemned only the granting of a preference by the same carrier or carriers, it set aside the order.

It is difficult to see how that decision militates against the legality of the Commission's present action. Here the discrimination, if any, between shippers was caused by the same carriers, the railroad appellees, because of their local loading charge. The Commission did not purport to pass upon the validity of line-haul rates of connecting carriers not before it or to require any action from them with respect to this local loading charge over which they had no direct control. It merely looked to the respective line-haul conditions in determining whether the local loading charge of the carriers before it was discriminatory or prejudicial. The *New Jersey Central* case plainly does not prevent this, and the fact that the other connecting carriers were not before the Commission is of no significance.

If we are correct in our view that the question whether the line-haul conditions were to be considered is a factual one within the Commission's discretion (see pp. 28-30, *supra*), the circumstances here plainly afford a rational basis for the Commission's decision to consider them and preclude the disturbance of this conclusion of the Commission. *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 145-146. Thus, the incidence of the loading charge is made to depend by

these tariffs solely upon whether the cotton is transported to one line-haul destination or another; the loading costs, when no loading charge is assessed, are absorbed by the railroads out of their line-haul rates; and the loading charge is not even paid until the line-haul is completed and the ultimate destination known, and then only by deduction by the carrier from the refund of a portion of the line-haul rates made under the transit settlement.

III

THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE COMMISSION'S FINDINGS.

In considering the evidence before the Commission, this Court under the well settled rule cannot weigh the evidence but can only ascertain whether there is any substantial evidence in the record to support the Commission's findings *New England Divisions Case*, 261 U. S. 184, 204; *Western Chemical Co. v. United States*, 271 U. S. 268, 271; *United States v. Carolina Freight Carriers Corp.*, 315 U. S. 475, 490. Appellant challenges the evidence only on two findings: as to difference in truck competition, and as to the relative level of the line-haul rates. Merely the evidence which appellant admits was in the record requires the rejection of these contentions.

In connection with the evidence on the question of truck competition, appellant admits (Br. 32) that the evidence shows that while there was truck

competition from the compress points to the Texas Gulf ports there was no such competition from the compress points to the Southeast. The objection is made, however, that the evidence shows the same amount of truck competition between gin origins and nearby compress points on all cotton shipments, regardless of whether they are ultimately reshipped to the Gulf ports or to the Southeast. This is quite true but of no importance. The Commission based its decision on the theory that it was entitled to look to line-haul conditions, and the finding made is plainly to the effect that there is line-haul truck competition to the Texas Gulf ports, but none to the Southeast (R. 22, 23). The evidence, by appellant's own admission, supports such a finding.

As to the question of evidence with respect to the Commission's finding that the carload levels were already relatively lower to the Southeast than to the Gulf ports (R. 23, 24), we refer the Court to Exhibit 38 (R. 272) before the Commission, appended to appellant's brief (p. 56). This exhibit shows line-haul carload rates¹¹ in cents per hundred pounds, average earnings per ton mile in mills, and average earnings per car-mile in cents. Using certain Oklahoma cities as representative origins¹² and

¹¹ As proof of that fact, see R. 115-116, 119-120, 122, 137-139.

¹² The different rates listed therein are for varying minimum weights and are referred to by column number.

¹³ These cities are Anadarko, Chickasha, Clinton, Elk City, Hobart, Oklahoma City, Pauls Valley and Waurika.

Houston, Texas, and Columbia, South Carolina, as representative destinations for the purpose of analysis, the following results appear:

From Oklahoma Origins

[Average distance to Houston, Tex., 452 miles; to Columbia, S. C., 1,193 miles]

From	To	Min lbs. 25,000	Min lbs. 47,000	Min lbs. 50,000	Min lbs. 65,000
Rate	Houston	54		47	40
	Columbia	82	73	67	
Earnings per ton-mile	Houston	23.8		20.3	17.2
	Columbia	12.7	12.2	11.2	
Earnings per car-mile	Houston	29.8		50.8	57.4
	Columbia	17.2	41.4	29.1	

This diagram illustrates that the ton mile and car mile gross earnings to the Southeast under the carload rates are much lower than they are to the Texas Gulf ports. Appellant admits this (Br. 32-34) but points to the fact that the Commission has frequently held that rates for longer distances should properly yield lower returns than rates for shorter distances and that a bare comparison of rates to different territories which shows nothing but rates and distances is without probative value. Examination of the cases cited by appellant (Br. 34) reveals that they deal with an entirely different situation. In these cases it was claimed that a rate was unreasonable or discriminatory, and the only evidence to support this claim was that it brought the carrier a different gross car mile or ton mile return than some other rate. Naturally, if a carrier is entitled to higher ton and car mile earnings when a haul is short, the fact that it is receiving

such under a particular rate has little probative value in establishing the illegality of that rate. Here, however, the fact that the ton and car mile gross earnings are lower to the Southeast is not employed by the Commission in support of a proposition that there is anything unlawful about the level of the respective line-haul rates. Rather, it is used only to show that the rate level to the shipper was relatively lower on the traffic to the Southeast. Plainly, this evidence as to car and ton mile earnings has probative value for that purpose and constitutes substantial evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decree of the district court should be affirmed.

✓ CHARLES FAHY,

Solicitor General.

✓ THURMAN ARNOLD,

Assistant Attorney General.

✓ ROBERT J. PIERCE,

Special Assistant to the Attorney General.

✓ WALTER J. CUMMINGS, Jr.,

Attorney.

DANIEL W. KNOWLTON,

Chief Counsel,

J. STANLEY PAYNE,

Assistant Chief Counsel,

Interstate Commerce Commission.

• FEBRUARY 1943

APPENDIX

Interstate Commerce Act, February 4, 1887; c. 104, Part I, 24 Stat. 379, as amended.

Section 1 (1) (a) provides:

The provisions of this chapter shall apply to common carriers engaged in—

The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; * * *

From one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States; or from or to any place in the United States to or from a foreign country, but only insofar as such transportation or transmission takes place within the United States (49 U. S. C. 1 (1) (a)).

Section 1 (3) (a) provides:

The term "common carrier" as used in this chapter shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this chapter it shall be held to mean "common carrier." The term "railroad" as used in

this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation of delivery of any such property. The term "transportation" as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "person" as used in this chapter includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof (49 U. S. C. 1 (3) (a)).

Section 1 (5) (a) provides:

All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful (49 U. S. C. 1 (5) (a)).

Section 2 provides:

If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful (49 U. S. C. 2).

Section 3 (1) provides:

It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of

any other carrier of whatever description (49 U. S. C. (1)).

Section 6 (1) provides:

Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection, as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively,

are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this chapter (49 U. S. C. 6 (1)).

Section 15 (1) provides:

Whenever, after full hearing, upon a complaint made as provided in section 13 of this chapter or after full hearing under an order for investigation and hearing made by the commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in the first section of this chapter, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the

extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed (49 U. S. C. 15 (1)).

Section 15 (7) provides:

Whenever there shall be filed with the commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or

practice goes into effect, the commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible (49 U. S. C. 15 (7)).

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 520

L. T. BARRINGER AND COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF TENNESSEE.

BRIEF ON BEHALF OF THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, GULF, COLORADO AND SANTA FE RAILWAY COMPANY, PANHANDLE AND SANTA FE RAILWAY COMPANY, MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, AND THE KANSAS CITY SOUTHERN RAILWAY COMPANY, RAILROAD APPELLEES.

✓ **R. S. OUTLAW,**
✓ **ROLAND J. LEHMAN,**
1211 Railway Exchange,
Chicago, Illinois,

✓ **C. S. BURG,**
Railway Exchange,
St. Louis, Missouri,

W. E. DAVIS,
K. C. S. Building,
Kansas City, Missouri,

CLINTON H. MCKAY,
Exchange Building,
Memphis, Tennessee,
Attorneys for Railroad
Appellees.

TABLE OF CONTENTS.

	PAGE
Statement of the Case	4
The Proceedings in the District Court.....	1
The Proceedings Before the Commission.....	2
History of the Tariffs and Justification Therefor.....	4
The Questions Presented	8
Summary of Argument	9
Argument	11
The Order of the Commission Is Based Upon Proper Standards of Lawfulness.....	11
Section 2	11
Section 3(1)	26
The Order of the Commission Is Adequately Sup- ported by Essential Findings	32
The Order of the Commission Is Adequately Sup- ported by the Evidence	38
Conclusion	43
Appendix A—Statutes Cited.....	45

CASES CITED.

Adams v. Mills, 286 U. S. 397	21
A. T. & S. F., The v. United States, 295 U. S. 193.	21
A. T. & S. F. Ry. Co. v. United States (1914), 232 U. S. 199	20
Cane Sugar from Wisconsin to Minnesota (1934), 203 I. C. C. 373	14
Capital City Gas Co. v. Central of Vermont Ry. Co. (1905), 11 I. C. C. 104	13
Cattle Raisers Assn. v. Fort Worth & D. C. Ry. Co. (1898), 7 I. C. C. 513	15, 24
Central R. R. Co. of New Jersey v. United States, 257 U. S. 247	23
Chesapeake & Ohio Ry. Co. v. United States, 11 Fed. Supp. 588; 296 U. S. 187	35
Colorado v. United States (1926), 271 U. S. 153	35
Commodity Rates in Official Territory (1935), 209 I. C. C. 703	28
Consolidated Southwestern Cases, 185 I. C. C. 357; 188 I. C. C. 307; 205 I. C. C. 601	28, 40
Corpus Juris Secundum, Vol. 13, page 123.	21
Cotton Exchange of Augusta v. A. C. L. R. Co. (1932), 190 I. C. C. 513	28
Cotton from and to Points in Southwest and Memphis, 208 I. C. C. 677	4, 5, 7, 30, 36, 41
Davidson Transfer & Storage Co. v. United States (1942), 42 Fed. Supp. 245; 87 L. ed. 21	33
Ex Parte 123, In the Matter of Increases in Rates, Fares and Charges, 226 I. C. C. 41	5
Federal Match Corporation v. Great Northern Rail- way Co., 102 I. C. C. 353; 128 I. C. C. 415	14

Ft. Smith Traffic Bureau v. St. L. S. F. R. R. Co. (1908), 13 I. C. C. 651.....	13
Grain Case Modifications, 223 I. C. C. 235.....	40
Hudson County Coal Dealers Assn. v. C. R. R. Co. of N. J. (1937), 219 I. C. C. 676.....	28
Interstate Commerce Commission v. Alabama Midland Ry. (1897), 168 U. S. 144.....	27
Interstate Commerce Commission v. Baltimore & Ohio R. R. Co. (1890), 43 Fed. 37, 145 U. S. 263.....	29
Interstate Commerce Commission v. Baltimore & Ohio R. R. Co., 225 U. S. 326.....	19, 20
Interstate Commerce Commission v. Delaware L. & W. R. R. Co., 220 U. S. 235.....	19, 20
Interstate Commerce Commission v. Stickney, 215 U. S. 98.....	18, 23
Investigation and Suspension Docket No. 4981, Load- ing Cotton in Oklahoma, 248 I. C. C. 643.....	1, 3
Labor Board v. Link-Belt Co. (1941), 311 U. S. 584.....	38
Lawrenceville Cooperage Co. v. A. C. & Y. Ry. Co. (1938), 226 I. C. C. 773.....	14
Manufacturers Ry. Co. v. United States, 246 U. S. 457..	38
McNeil and Sons v. Western Maryland Ry. Co. (1930), 42 Fed. (2d) 669; 51 Fed. (2d) 1073; 284 U. S. 665.....	29
Merchants Warehouse Co. v. United States, 283 U. S. 501.....	16, 17
Miller Waste Mills v. C. M. St. P. & P. R. Co. (1938), 226 I. C. C. 451.....	14
Pennsylvania Co. v. United States (1915), 236 U. S. 351	38
Qnanab, A. & P. Ry. Co. v. United States (1939), 28 Fed. Supp. 916; 308 U. S. 527; 309 U. S. 694.....	33
Railroad Commission of Wisconsin v. Ann Arbor R. R. Co., 177 I. C. C. 588.....	28

Rate Structure Investigation, Part III, Cotton (1931), 174 I. C. C. 9; 176 I. C. C. 249	27
Richmond Chamber of Commerce v. Seaboard Air Line Railway Co. (1917), 44 I. C. C. 455, 249 Fed. 368, 254 U. S. 57	13, 14
Rochester Telephone Corporation v. United States (1939), 307 U. S. 425	38
Routing Cottonseed to Kansas and Missouri, 231 I. C. C. 775	30
Seaboard Air Line Railway Co. v. United States, 254 U. S. 57	14
Solar Refining Co. v. Ann Arbor R. Co. (1932), 182 I. C. C. 693	27
Southern Class Rate Investigation, 100 I. C. C. 513	40
Sugar from California to Chicago (1935), 211 I. C. C. 239	28
Sun-Maid Raisin Growers Assn. v. United States (1940), 33 Fed. Supp. 959; 312 U. S. 667	18
Swayne & Hoyt, Ltd. v. United States (1937), 300 U. S. 297	38
Texas & Pacific Ry. Co. v. Interstate Commerce Com- mission (1896), 162 U. S. 197	26, 27, 29
Tidewater Oil Company v. Director General (1921), 62 I. C. C. 226; 73 I. C. C. 528	14
United States v. Chicago & Alton Ry. Co., 148 Fed. 646; 156 Fed. 558, 212 U. S. 563	19
United States v. Chicago Heights Trucking Co. (1940), 310 U. S. 344	38
United States v. L. & N. R. Co. (1914), 235 U. S. 314	38
United States v. Lowden (1939), 308 U. S. 225	38
Western Trunk-Line Class Rates, 164 I. C. C. 1	40
Wight v. United States (1897), 167 U. S. 512	12, 16, 17

v

STATUTES.

Interstate Commerce Act, Part I:

Section 1(3)(a)	17, 18, 45
Section 2	9, 11, 29, 31, 34, 35, 46
Section 3(1)	9, 11, 25, 26, 34, 35, 46
Section 6(1)	16, 17, 18, 47
Section 14(1)	32, 48
Section 15(1)	48
Section 15(7)	3, 49

English Statutes:

Equality Clause, Section 90 of the Railway Clauses Consolidation Act of 1845, 8 & 9, Vict., ch. 20	16
---	----

Judicial Code:

Sections 212 and 213, Title 28 U. S. C., Section 45a.	2
--	---

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 520.

L. T. BARRINGER AND COMPANY,

Appellant,

vs.

**UNITED STATES OF AMERICA, INTERSTATE COM-
MERCE COMMISSION, THE ATCHISON, TOPEKA
AND SANTA FE RAILWAY COMPANY, ET AL.,**

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF TENNESSEE.

**BRIEF ON BEHALF OF THE ATCHISON, TOPEKA AND SANTA
FE RAILWAY COMPANY, GULF, COLORADO AND SANTA FE
RAILWAY COMPANY, PANHANDLE AND SANTA FE RAIL-
WAY COMPANY, MISSOURI-KANSAS-TEXAS RAILROAD COM-
PANY, AND THE KANSAS CITY SOUTHERN RAILWAY COM-
PANY, RAILROAD APPELLEES.**

STATEMENT OF THE CASE.

The Proceedings in the District Court.

The appellant, a cotton merchant of Memphis, Tennessee, filed bill of complaint in the District Court on or about May 11, 1942, to perpetually enjoin and set aside the operation and effect of an order of the Interstate Commerce Commission, Division 3, in *Investigation and Sus-*

pension Docket No. 1981, Loading Cotton in Oklahoma, 248 I. C. C. 643, issued January 29, 1942, to become effective, as postponed, on April 21, 1942. The United States of America and the Interstate Commerce Commission were named as defendants (R. 1-9).

The Atchison, Topeka and Santa Fe Railway Company, Gulf, Colorado and Santa Fe Railway Company, Panhandle and Santa Fe Railway Company, Missouri-Kansas-Texas Railroad Company, and The Kansas City Southern Railway Company, respondents in the proceedings before the Interstate Commerce Commission, were, by order of the District Court entered on June 29, 1942 (R. 65), pursuant to authority of Sections 212 and 213 of the Judicial Code (Title 28, U. S. C., Sec. 45a), permitted to intervene as parties defendant in the proceedings below (R. 60-65). The Oklahoma Railway Company was a respondent before the Commission, but did not intervene in the court below.

July 17, 1942, the District Court, in a *per curiam* opinion (R. 85), accompanied by its findings of fact and conclusions of law (R. 78-84), found that the Interstate Commerce Commission, in its report, made essential basic findings of fact, supported by substantial evidence of record; and that the order of the Commission is lawful. Final decree dismissing the complaint was entered August 17, 1942 (R. 85). From that decree direct appeal was taken to this Court.

The Proceedings Before the Commission.

By tariffs filed with the Commission to become effective June 11, 1941, and later, appellees, and the Oklahoma Railway Company, proposed to cancel the loading charge on shipments of cotton transported at carload rates from points in Oklahoma to certain Gulf ports, namely, Beaumont, Corpus Christi, Galveston, Houston, Orange, Port

Arthur, and Texas City, Texas, and Lake Charles, Louisiana (R. 14, 79, 109-111). Protests against said tariffs were filed with the Commission by L. T. Barringer and Company, appellant herein, New Orleans Joint Traffic Bureau, and others (R. 14, 79, 103-105). The Commission, acting under authority conferred upon it by Section 15(7) of the Interstate Commerce Act,* entered an order on June 10, 1941, which suspended the operation of said tariffs until January 11, 1942, and instituted an investigation into the lawfulness thereof. The proceeding was designated *Investigation and Suspension Docket No. 4981, Loading Cotton in Oklahoma*, and railroad appellees and the Oklahoma Railway Company were named as respondents therein (R. 11-12, 79). Subsequently, respondents further postponed the effective date of said tariffs until the termination of the proceedings before the Commission (R. 14, 79-80).

January 29, 1942, after full hearing, brief, and oral argument, the Commission, by Division 3, entered a report in I. & S. Docket No. 4981 setting forth its findings of fact and conclusions, and holding that the elimination of the loading charge on cotton originating in Oklahoma on respondents' lines, compressed in transit, and moving from compress points to the Texas Gulf ports and Lake Charles, La., at the carload rate from origin point, was just and reasonable and not otherwise unlawful (R. 13-33, 80) (248 I. C. C. 643). With said report, and as a part thereof, the Commission entered an order dated January 29, 1942, which vacated and set aside the previously entered order of suspension in I. & S. Docket 4981 as of February 21, 1942, and discontinued the proceeding (R. 33-34, 80).

February 18, 1942, appellant herein filed petition for reconsideration with the Commission (R. 35-54, 80), and the Commission, pending action on the petition, deferred the

* This, and other sections of the Interstate Commerce Act, hereinafter referred to as the Act, which are pertinent to the issues, are reproduced in Appendix A hereto.

effective date of its order of January 29, 1942, to April 21, 1942 (R. 80). Railroad appellees, on March 14, 1942, filed a reply to said petition (R. 285-290), and the Commission, on April 13, 1942, denied said petition and permitted the tariffs under consideration to become effective on April 21, 1942 (R. 80). Such tariffs are now in effect (R. 80).

History of the Tariffs and Justification Therefor.

For many years the carriers maintained only l.c.l. or any-quantity rates on cotton originating in the Southwest and performed all necessary loading services just as in the case of any other l.c.l. freight. However, August 7, 1933, the southwestern carriers instituted a system of carload rates on cotton primarily for the purpose of meeting truck competition. These so-called carload rates were reviewed by the Commission and, subject to a revision of certain rate relations, were found lawful in Docket No. 26235, *Cotton from and to Points in Southwest and Memphis*, 208 I. C. C. 677. They were in the nature of any-quantity rates inasmuch as they provided for the accumulation of cotton in small quantities from gin points to compresses or concentrating stations and for the reshipment therefrom to ultimate destination in carload lots, subject to certain minima designed to encourage heavy loading. For all practical purposes, the transportation of cotton under the so-called carload rates is identical with the transportation of cotton on l.c.l. or any-quantity rates. The through charges are ultimately settled under a transit arrangement on the basis of the carload rates from first origin to final destination (R. 78-79, 111-114).

When the carload system of rates was initially established, and for several years thereafter, the carriers imposed the obligation of loading the cotton at gin origins on the shipper under the rates established. They fur-

ther provided that when carriers loaded the cotton at shipper's request, a charge therefor, amounting to five cents per square bale and 2½ cents per round bale would be assessed.* This loading arrangement was established in order to permit the carriers to engage in the transportation of cotton under a system which would net them the greatest possible revenues out of the severely depressed rates caused by motor truck competition (R. 115)—an objective specifically approved by the Commission in *Cotton from and to Points in Southwest and Memphis*, 208 I. C. C. 677, 691.

For a period of time the carload system of rates maintained by the carriers was successful in meeting the truck competition. However, during 1938-1939, the trucking of cotton to the Texas Gulf ports became more prevalent, and the rail carriers serving Oklahoma and Texas found it necessary to take drastic action. Most of the cotton trucked was to the Texas Gulf ports from Texas origins. Trucking from Oklahoma to the Texas Gulf ports was not as acute. In addition to the trucking to Texas Gulf ports, there was a tremendous increase in the trucking from country stations to compress points. The rail carriers analyzed the situation and discovered that the loading charge established in connection with the system of carload rates was considered a nuisance by cotton producers and shippers alike and was responsible in large measure for the diversion of cotton traffic to the trucks (R. 115-116).

In order to meet this situation, effective October 15, 1939, a tariff item was published applicable on cotton traffic originating within the State of Texas which provided that the rail carriers would load cotton tendered to them at origins in Texas at their depots or cotton platforms and

* Increased to 5½¢ per square bale and 2¾¢ per round bale under *Ex Parte 123, In the Matter of Increases in Rates, Fares and Charges*, 226 I. C. C. 41.

would bear the expense of such loading (R. 153-155, 159, 165). Effective October 28, 1939, the Railroad Commission of Texas granted similar authority for intrastate application (R. 165). Division 2 of the Interstate Commerce Commission refused to suspend the interstate tariff (R. 29-30, 155).

There was also under consideration at the same time a reduction in the through rail rates from the Southwest, including Oklahoma, for the purpose of more adequately meeting truck competition, which revision was accomplished on June 20, 1940. Because of opposition of some of the interested rail carriers to the elimination of the loading charge in Oklahoma, and because it was desired to determine the extent to which the reduced rates would be effective in combatting the movement of cotton by truck from points in Oklahoma, no action was taken at that time toward the establishment of the Texas free-loading provision at points in Oklahoma (R. 116-117).

While the rate reductions were helpful, they by no means satisfied the Oklahoma shippers, and the rail carriers received constant complaints and threat of loss of traffic from Oklahoma origins because of their failure to remove the loading charge from such origins to the same extent that it had been removed from Texas origins (R. 117). In recognition of this situation, and for the purpose more effectively of meeting truck competition from Oklahoma origins, railroad appellees and the Oklahoma Railway Company provided for the elimination of the loading charge on cotton from points in Oklahoma to the Texas Gulf ports above named and Lake Charles, Louisiana (R. 111, 128). The rule is published both in the transit tariffs and the rate tariffs (R. 135).

Railroad appellees' action in eliminating the loading charge on cotton to the same extent from Oklahoma origins as from Texas origins is in harmony with Finding 8 of the

Commission's decision in *Cotton from and to Points in Southwest and Memphis*, 208 I. C. C. 677, 732, wherein it held that with respect to southwestern points of origin on the one hand, and Lake Charles and the Texas Gulf ports on the other hand, the maintenance of an interstate carload rate from any point of origin to any port higher for substantially the same distance than the interstate carload rate from the same point of origin to another port or from another point of origin to the same port, resulted and would result in undue prejudice to the cotton traffic upon which such higher level of rates was maintained and to the shippers thereof, and in undue preference of the traffic upon which the lower level was maintained and the shippers thereof (R. 128).*

The absorption by railroad appellees and the Oklahoma Railway Company of the loading charge on cotton from Oklahoma origins does not have unlimited application. Because of the opposition of some rail carriers in whose opinion the establishment of free loading of cotton in Oklahoma would prove unduly costly, its application was restricted to the Texas Gulf ports above named and Lake Charles, La., instead of to the wider destination territory permitted in the Texas tariffs (R. 18, 25-26, 129, 130, 134, 161-162). Because there is no truck movement of cotton from Oklahoma to the Southeast, and because the rates on cotton to the Southeast are already lower relatively than they are to the Texas Gulf ports, the tariffs of the carriers do not provide for the elimination of the loading charge on cotton from points in Oklahoma to the Southeast (R. 122, 137).

* Prior to publication of the tariffs under consideration, the Corporation Commission of Oklahoma filed complaint with the Oklahoma carriers alleging that they had failed to comply with Finding 8 of the Commission's decision by failing to establish free loading of cotton from Oklahoma origins to Texas Gulf ports to the same extent that the rule had been established from Texas origins (R. 17-18, 128).

The Questions Presented.

The questions presented in this cause may be summarized as follows:

- (1) Is the order of the Commission invalid because based upon improper standards of lawfulness?
- (2) Is the order of the Commission supported by essential findings?
- (3) Are the findings and ultimate conclusions of the Commission supported by the evidence?

SUMMARY OF ARGUMENT.

Railroad appellees, with the approval of the Interstate Commerce Commission, absorb the loading charge formerly assessed by them on shipments of cotton moving from Oklahoma origins, in transit, to the Texas Gulf ports and Lake Charles, Louisiana. They do not absorb the similar loading charge on shipments of cotton moving from the same origins, in transit, to the Southeast.

Appellant, which ships cotton to the Southeast, claims the right to equality of treatment under the provisions of the Interstate Commerce Act. It contends that removal of the loading charge in the case of shipments to the Texas Gulf ports and Lake Charles, Louisiana, and its continuance to the Southeast offends the provisions of Section 2 of the Act prohibiting unjust discrimination and the provisions of Section 3(1) of the Act prohibiting undue or unreasonable prejudice or disadvantage.

Appellant's contentions are without merit. To constitute violation of Section 2 the shipments claimed to be favored and the shipments claimed to be subjected to unjust discrimination must move from and to the same points, for the same distance and over the same route of movement. Obviously, appellant's shipments which move from Oklahoma to the Southeast do not move from and to the same points, for the same distance, and over the same route of movement, as shipments from Oklahoma to the Texas Gulf ports and Lake Charles, Louisiana.

To constitute violation of Section 3(1) the shipments claimed to be favored and the shipments claimed to be prejudiced must move under the same circumstances and conditions. Difference in the extent and character of

truck competition and the relative profitableness of the transportation constitute dissimilar circumstances and conditions warranting different relations of rates and charges under Section 3(1). The existence of truck competition between Oklahoma and the Texas Gulf ports and the absence thereof between Oklahoma and the Southeast as well as the fact that rates from Oklahoma to the Southeast are relatively lower than rates from Oklahoma to the Texas Gulf ports permit absorption of the loading charge in the case of shipments destined to the Texas Gulf ports and continuance thereof in the case of shipments destined to the Southeast without violation of the provisions of Section 3(1).

The line-haul rates for transportation, plus charges for accessorial services, if any, constitute the total freight charges paid for the services rendered by the railroads. While separately published, charges for accessorial services, if any, result in increased or decreased ultimate total charges to the shipper or consignee. Therefore, separate charges, if any, for accessorial services such as loading must be considered, together with the line-haul rates for transportation, in determining whether or not the provisions of Sections 2 and 3(1) of the Interstate Commerce Act have been violated.

The order of the Commission is adequately supported by appropriate findings and is based upon evidence of record. Its report clearly reveals the basis of its ultimate determination that cancellation of the loading charge was just and reasonable and not otherwise unlawful and discloses the facts and circumstances upon which it was predicated.

ARGUMENT.

The Order of the Commission Is Based Upon Proper Standards of Lawfulness.

Railroad appellees contend that elimination of the loading charge on shipments moving at the carload rate from points in Oklahoma to the Texas Gulf ports and Lake Charles, Louisiana, without at the same time eliminating the loading charge on shipments from points in Oklahoma to points in the Southeast, is entirely lawful and proper because (1) there is no trucking of cotton from Oklahoma to the Southeast, and (2) the rail rates to the Southeast are relatively lower than the rail rates to the Texas Gulf ports.

Appellant contends that the elimination of the loading charge on cotton from Oklahoma origins to the Texas Gulf ports and Lake Charles, La., without at the same time discontinuing such charge in the case of shipments from Oklahoma to the Southeast, is in violation of Sections 2 and 3(1) of the Interstate Commerce Act, and that the order of the Commission declaring the practice of railroad appellees in such respect to be just and reasonable and not otherwise unlawful, is invalid because based upon improper standards of lawfulness.

For convenience, the lawfulness of the tariffs under consideration and the validity of the Commission's order upholding the same, will be separately discussed in relation to the provisions of Section 2 and Section 3(1) of the Act.

Section 2.

Section 2 of the Act prohibits any common carrier subject to the provisions thereof from directly or indirectly charging, demanding, collecting or receiving, "from any

person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, * * * than it charges, demands, collects or receives from any other person or persons for * * * a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions * * *

However, the provisions of Section 2 have application only to the transportation of property between the same points, for the same distance, and over the same route of movement. In *Wight v. United States* (1897), 167 U. S. 512, this Court expressly held that the provisions of Section 2 have application only when shippers, said to be unequally treated, make shipments "over the same line, the same distance, under the same circumstances of carriage." (p. 518.)

In the *Wight* case, it appeared that both the Pittsburgh, Cincinnati, Chicago & St. Louis Railway, popularly known as the "Panhandle", and the Baltimore & Ohio Railroad provided transportation service between Cincinnati and Pittsburgh, and that, there was effective via both roads a 15 cent rate for the transportation of beer between Cincinnati and Pittsburgh. The "Panhandle" applied the rate of 15 cents to the industry of one Bruening, located upon an industrial siding on its line at Pittsburgh. The Baltimore & Ohio, which also carried the 15 cent rate to Pittsburgh, did not reach Bruening's brewery with its own rails, and in order to equalize the competitive advantage enjoyed by the "Panhandle", first offered to perform the cartage from its freight depot in Pittsburgh to Bruening's brewery free of charge, and then arranged that Bruening himself should do the hauling, for which he was allowed 3½ cents per 100 pounds. One Wolf also operated a brewery at Pittsburgh, but was not located upon the rails of any carrier, and was obliged to pay the full 15 cent rate between Cincinnati and Pittsburgh, plus the cost of cartage, to get his shipments to his brewery because the Baltimore

& Ohio refused to make him an allowance similar to that made by it to Bruening. The Baltimore & Ohio was indicted and convicted for violation of Section 2. The conviction was sustained by this Court because the Baltimore & Ohio, in effect, charged Bruening only 11½ cents for the same line-haul transportation for which it charged Wolf the full 15 cents. In the course of its opinion, the Court stated:

"The wrong prohibited by the section is a discrimination between shippers. It was designed to compel every carrier to give equal rights to all shippers *over its own road* and to forbid it by any device to enforce higher charges against one than another. . . . But the service performed in transporting from Cincinnati to the depot at Pittsburgh was precisely alike for each. The one shipper paid 15 cents a hundred; the other, in fact, but 11½ cents. It is true he formally paid 15 cents, but he received a rebate of 3½ cents, *and regard must always be had to the substance, and not to the form.* . . . It was the purpose of the section to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, *shipping over the same line, the same distance, under the same circumstances of carriage,* are compelled to pay different prices therefor." (pp. 517-518.) (Emphasis supplied.)

Pursuant to the above-quoted statement of this Court, there can be no violation of the provisions of Section 2 unless the shipper alleged to be prejudiced ships his property from and to the same points, for the same distance, and over the same route of movement as the shipper alleged to be preferred. The interpretation of Section 2 by the Court in the *Wight case* has been uniformly and consistently applied by the Interstate Commerce Commission in its decisions over the course of a great many years. *Capital City Gas Co. v. Central of Vermont Ry. Co.* (1905), 11 I. C. C. 104, 106-107; *Ft. Smith Traffic Bureau v. St. L. S. F. R. R. Co.* (1908), 13 I. C. C. 651, 656; *Richmond Chamber of Commerce v. Seaboard Air Line Railway Co.* (1917),

44 I. C. C. 455, 466, (Commission's decision assailed upon another point and sustained, 249 Fed. 358, 254 U. S. 57); *Tidewater Oil Company v. Director General* (1921), 62 I. C. C. 226, 227; 73 I. C. C. 528; *Cane Sugar from Wisconsin to Minnesota* (1934), 203 I. C. C. 373, 376; *Lawrenceville Cooperage Co. v. A. C. & Y. Ry. Co.* (1938), 226 I. C. C. 773, 781; *Miller Waste Mills v. C. M. St. P. & P. R. Co.* (1938), 226 I. C. C. 451, 453.

In *Richmond Chamber of Commerce v. Seaboard Air Line Railway Co.*, 44 I. C. C. 455, 466, the Commission considered the question whether the absorption of certain switching charges at Richmond, Va., constituted unjust discrimination under Section 2, and stated:

"It is the line-haul movement which that Section primarily contemplates . . ."

"The carriers' refusal to absorb the switching charges on traffic to and from strictly local points is justifiable. In such instances the transportation service is substantially dissimilar, for the movement is either over a different line or, if over the same line, for a substantially different line haul." (p. 466.)*

In *Tidewater Oil Co. v. Director General*, 62 I. C. C. 226, 227, the Commission considered a somewhat similar situation at Bayonne, N. J., and following the principle announced in the foregoing decision, stated:

"While the absence of competition does not prevent a finding of unjust discrimination under section 2, to sustain such a finding it must appear that the transportation services are like and contemporaneous and are performed under substantially similar circumstances and conditions, and that the property transported is like traffic. But it is the line haul to which section 2 primarily relates, and if the movement is

* This portion of the Commission's decision was not under consideration in *Seaboard Air Line Railway Co. v. United States*, 254 U. S. 57. In that decision, the question considered was whether unjust discrimination resulted from the absorption of switching charges in connection with line-haul transportation between the same points of origin and destination. See *Federal Match Corporation v. Great Northern Railway Co.*, 102 I. C. C. 353, 128 I. C. C. 415.

either over a different line or, if over the same line, for a substantially different haul, the transportation service is substantially dissimilar. *Richmond Chamber of Commerce v. S. A. L. Ry.*, 44 I. C. C. 455, 466; *Wight v. U. S.*, 167 U. S. 512." (p. 227)

In *Cattle Raisers Assn. v. Fort Worth & D. C. Ry. Co.* (1898), 7 I. C. C. 513, the Commission, although recognizing that the reasonableness of a terminal charge must be separately considered (p. 538), similarly held that the absorption of a terminal charge in one instance and failure to do so in another does not constitute unjust discrimination under Section 2, unless the line-haul transportation in both instances is between the same points, over the same railroad, and in the same direction (pp. 539-540).

The absorption by carriers of a loading charge is the same as the absorption by carriers of the switching charges in the Commission cases above mentioned. In the instant case, rail appellees absorb the loading charge in connection with shipments of cotton from Oklahoma to the Texas Gulf ports and Lake Charles, Louisiana. They do not absorb the loading charge in connection with shipments of cotton from Oklahoma to the Southeast. Appellant ships cotton from Oklahoma to the Southeast. Its shipments do not, therefore, move from and to the same points as the shipments with respect to which the loading charge is absorbed. They do not move for the same distance or over the same routes of movement as the shipments with respect to which the loading charge is absorbed. Accordingly, the provisions of Section 2 of the Act, as interpreted by this Court in the *Wight* case, and uniformly and consistently applied by the Interstate Commerce Commission, are not violated by the tariffs under consideration herein.

Appellant admits that it has no case under Section 2, if the provisions of that section have application only to shipments moved for the same distance over the same route of movement as above indicated (Br. 37). However, it

contends that the provisions of Section 2 were intended to have application in instances where there is a dissimilarity in the matter of line-haul services. It admits that Section 2 was patterned after Section 90 of the English Railway Clauses Consolidation Act of 1845, known as the "Equality Clause," which prohibits unequal charges on goods when "passing only over the same portion of the line of railway under the same circumstances;" but contends there is a fundamental difference in phraseology between the two statutes which evidences an intent on the part of Congress to have Section 2 apply independently to all separately-stated accessorial services and charges; such as loading, despite dissimilarity in the line-haul transportation (Br. 37).

But, in the *Wight* case, this Court expressly held that accessorial charges and terminal services must be considered along with the charges for the line-haul movement of traffic in determining whether or not the provisions of Section 2 have been violated. The Court said:

"And Section 6 of the act, as amended in 1889, throws light upon the intent of the statute, for it requires the common carrier in publishing schedules to state separately the terminal charges, and any rules or regulations which in any wise change, effect or determine any part or the aggregate of such aforesaid rates and fares and charges." (pp. 517-518.)

Appellant states that if it be true that Section 2 applies to a difference in charges for identical accessorial services only when the line-haul services are likewise identical, a preliminary finding to the latter effect would be jurisdictional whenever a Section 2 order is issued; but that in *Merchants' Warehouse Co. v. United States*, 283 U. S. 501, 511; this Court sustained an order of the Commission based on a finding of unjust discrimination although the report of the Commission completely ignored the matter of the line-haul services (Br. 39). But the precise point seems

not to have been considered by the Supreme Court in the *Merchants Warehouse case*. Moreover, in that case, the Court stated that "Section 2 forbids the carrier to discriminate by way of allowances for transportation services given to one, in connection with the delivery of freight at his place of business, which it denies to another in like situation." (p. 511.) The Court did not undertake to say what shippers or classes of shippers should be regarded as placed in a like situation. Obviously, in like situation, for the purposes of Section 2, requires shipments of goods between the same points, over the same road, for the same distance of movement, as expressly held in the *Wright case*, *supra*.

The fact that separate charges for accessorial services must be considered, together with the line-haul rates for transportation in determining whether or not the provisions of Section 2 have been violated, may not be seriously questioned. Section 2 prohibits the imposition and collection of unequal charges for like services "in the transportation of passengers or property," and transportation services, by express statutory definition, include accessorial services as well as line-haul movement of traffic. Paragraph (3)(a) of Section 1 of the Interstate Commerce Act defines the term "transportation", used in the Act, to include all services in connection with the handling of property transported, and paragraph (1) of Section 6 of the Act requires carriers to publish and file all rates and charges for transportation between different points on its own route, and between points on its own route and points on the route of any other carrier by railroad, and to "state separately all terminal charges . . . which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the . . . shipper or consignee."

Obviously, the handling charges referred to in para-

graph (3)(a) of Section 1 and the terminal charges referred to in paragraph (1) of Section 6 must be added to the rates for line-haul transportation to determine the aggregate of the rates, fares and charges for transportation, and cannot be separately considered under Section 2 without relation to the line-haul rates for transportation. That the Commission so considered the matter is evidenced by the fact that it stated in its order of suspension, entered June 10, 1941:

... Said schedules make certain reductions in rates for the transportation of cotton, earloads, in interstate and foreign commerce . . . (R. 11-12).

While not published as a part of the line-haul rates for transportation, handling and terminal charges result in increased or decreased ultimate total charges to the shipper or consignee. It is the line-haul rates for transportation plus the handling and terminal charges, if any, which constitute the total freight charges paid for the services rendered by the railroads. In *Sun-Maid Raisin Growers Assn. v. United States* (1940), 33 Fed. Supp. 959, affirmed 312 U. S. 667, the statutory court, composed of Wilbur, Circuit Judge, and St. Sure and Roche, District Judges, recognized that the cost of handling freight constitutes merely a separate component of the total charge for transportation. The court, after discussing the decisions of the Supreme Court in other situations, including *Interstate Commerce Commission v. Stickney*, 215 U. S. 98, stated:

"There is nothing in any of these Supreme Court decisions cited by the plaintiffs which justifies the conclusion that the railroads were prohibited by law from making a separate charge for items involved in transportation which might otherwise be included in the gen-

* Mr. J. G. Jay, witness for respondents, testified as follows:

"Q. I am inquiring if that same cotton had moved by rail, contrasting the present tariff with what you propose to put in the tariff, will there be any change in the rail freight rates to be paid? A. There would be no change in the rail freight rates but there would be a change in the total charge amounting to five and a half cents a bale" (R. 139.)

eral freight rate if the tariff schedules make it clear that they are not so included in the general freight rate. Other decisions assume, if they do not formally approve, separate charges in a tariff.

"We conclude that neither the common law nor the Shipping Act, 46 U. S. C. A., Sec. 816, Shipping Act Sec. 17, *supra*, forbids the separation, by a steamship company, of a freight charge into some of its component elements if the tariff clearly so provides." (p. 961.) (Emphasis supplied.)

In *United States v. Chicago & Alton Ry. Co.*, 148 Fed. 646, affirmed 156 Fed. 558, 212 U. S. 563, the District Court of the United States for the Northern District of Illinois stated that the word "rate" as used in the Interstate Commerce Act means the net cost to the shipper of the transportation of his property. The Court stated (148 Fed. 646, 647):

"... The word 'rate,' as used in the interstate commerce law, means the net cost to the shipper of the transportation of his property; that is to say, the net amount the carrier receives from the shipper and retains. In determining this net amount in a given case, all money transactions of every kind or character having a bearing on, or relation to, that particular instance of transportation whereby the cost to the shipper is directly or indirectly enhanced or reduced must be taken into consideration." (p. 647.)

Appellant states that in cases involving Section 2 as applied to charges for line-haul services, this Court has consistently held that the circumstances legally entitled to consideration do not include differences in circumstances arising either before the service of the carrier or after it is terminated, citing in this connection *Interstate Commerce Commission v. Delaware L. & W. R. R. Co.*, 220 U. S. 235, 253-254, and *Interstate Commerce Commission v. Baltimore & Ohio R. R. Co.*, 225 U. S. 326, 342-343 (Br. p. 40). In those cases, however, the circumstances

sought to be considered as justifying unequal charges between shippers were plainly outside the orbit of transportation, *i. e.*, ownership or non-ownership by the shipper of the goods tendered for transportation (220 U. S. 235), and differences with respect to competition between coal intended for railway consumption and other coal (225 U. S. 326). The loading charge under consideration herein is not a circumstance arising before the service of the carrier is begun or after it is terminated. It is a part of the actual transportation service rendered by the carrier.

In *A. T. & S. F. Ry. Co. v. United States*, 232 U. S. 199 (1914), the loading service was considered by the court to be an element properly affecting the carload rates for transportation. In the course of its opinion in that proceeding, the Supreme Court, stated:

"For in the shipment of fruit, as in that of other articles, it is impossible to lay down a rule which definitely fixes what loading includes and by whom it must be done. Nor is there any consistent practice on this subject, since from reported cases it appears that the claims of the parties are based rather on interest than on some definite principle. Sometimes, the shipper, as here, insists on the right to load and provide necessary appliances. At other times he demands that such service and appliances be furnished by the railroad company. Conversely the carriers sometimes claim, as here, the right to furnish service and facilities, while in other cases insisting that one or both must be supplied by the consignor. Cf. *National Lumber Dealers Association v. Atlantic Coast Line*, 14 I. C. C. 154; *Schultz v. Southern Pacific*, 18 I. C. C. 234; *In re Allowance for Lining and Heating Cars*, 26 I. C. C. 681; 25 I. C. C. 497 (pp. 215-6).

"The interest of the public is to be considered as well as that of shippers and carriers—their rights in turn having been adjusted by a reduction in the rate, if the loading is done in whole or in part by the shipper; and by an increase in the rate where the

loading is done in whole or in part by the carrier (p. 217).

"What is a proper rate on fruit in pre-cooling shipments, or a fair charge for hauling necessary ice or rendering other transportation services are all rate-making matters committed to the Commission. It may determine what shall be the difference in rate between carload and less than carload lots. *It may decide whether the difference in revenue, due to a difference in method of loading, warrants a difference in the rate on carload shipments of the same article*" (pp. 220-221). (Emphasis supplied.)

For many years, by virtue of custom and usage, and special statutory, contractual and tariff provisions, the burden of loading and unloading carload freight has been placed upon shippers and receivers. However, in the absence of understanding or agreement to the contrary, transportation includes loading and unloading. It is the primary duty of the carrier properly to load and unload freight delivered to it for transportation. *The A. T. & S. F. Ry. Co. v. United States*, 295 U. S. 193, 198; *Adams v. Mills*, 286 U. S. 397, 409-410, 414-415; 13 *Corpus Juris Secundum* 123. When performed by the carrier under its regularly published tariffs, the service of loading or unloading unquestionably constitutes a part of transportation.

Appellant states that railroad appellees cannot escape the application of Section 2 separately to the loading charges and services because other carriers which have no control over the loading services and charges and do not participate therein, but which participate with appellees in the through line-haul movement, transport the traffic in line-haul services to a variety of destinations (Br. p. 41). The extent of control exercised by the other carriers appears immaterial. However, appellant's contention in this respect is erroneous. The other carriers do exercise a very

potent influence with respect to the establishment, maintenance or removal of the loading charges and services. While the loading charges and services themselves are subject only to the direct control of appellees, they may not, as a practical matter, be placed in effect or removed without the approval of the other carriers participating in the line-haul movement since their approval thereof must be obtained in order to secure their concurrence in the line-haul tariffs providing for the through movement of the traffic. The situation is well illustrated by the following quoted testimony of Mr. J. G. Jay, witness for respondents, in response to inquiry whether the loading charge would be removed in the case of shipments moving through Little Rock, Arkansas, and Memphis, Tennessee, as well as in the case of shipments moving from points in Oklahoma, if the tariffs under consideration were approved by the Commission.

"Q. (By Mr. Bennett.) If the Commission approves the suspended tariff—that is your suspended tariff, will it be the Santa Fe's intention to remove the charge on cotton that is concentrated at Little Rock and Memphis or any other point in the Mississippi Valley territory and subsequently reshipped to points where through rates apply through such transit points? (R. 147.)

"The Witness: I have already stated that we would have no objection to performing free loading of traffic to all destinations. But, as I understand your question, Mr. Bennett, you want to know if it is our intention to proceed to do it.

"Q. (By Mr. Bennett.) My question is this: That if the Commission approves the suspended tariffs, will you remove the charge on cotton that is concentrated at Little Rock and Memphis and other points in that section that is reshipped to points where the through rates apply? (R. 148.)

"The Witness: I will answer it for you: We have no program to do that right now, but, obviously, for

the portion of the traffic that is now moving to the southeast, which we would like to control by having freight bills from our local points into the compress points, rather than having it trucked, we may find it necessary to reopen the question with the Southwestern lines of performing free loading to the southeast, but I can't say that we would put it in because we don't serve the river gateways and some of the other lines may refuse to participate with us in rates or routes in connection with which free loading is performed." (R. 148-149.)

The destination carriers participating in the through movement of the traffic from Oklahoma points of origin virtually control the assessment or non-assessment of loading charges because the originating lines who have control over the publication of tariff provisions respecting the loading charges and services are obliged to secure the concurrence of the destination carriers in the line-haul tariffs covering the through movement of the traffic. They may not, as in *Central R. R. Co. of New Jersey v. United States*, 257 U. S. 247, relied upon by appellant (Br. pp. 41-42), be viewed as responsible for the establishment, maintenance or removal of accessorial charges and services at points of origin on the lines of other carriers. But, they most certainly have a controlling voice in the matter. In Finding No. 3, the District Court found that the loading charge is maintained and assessed by the individual railroad performing the loading service (R. 78). The court did not, however, find that the other carriers participating in the through movement do not exercise control over the maintenance or removal of the loading charge in the manner above stated. No carrier would entertain for a moment the idea of imposing or eliminating such a charge without the approval of its connections.

In *Interstate Commerce Commission v. Stickney*, 215 U. S. 98, also relied upon by appellant (Br. p. 42), this Court stated that the reasonableness of the separate

terminal charge for transporting live stock to the Union Stock Yards at Chicago must be determined independently of the prior charges for transportation over the lines of the carrier or of connecting carriers. In so holding, the Court was prompted by the necessity for protecting the terminal carrier which could not rightfully be deprived of a reasonable terminal charge because of amounts paid other carriers for line-haul transportation. However, the fact that under such circumstances the reasonableness of one of the separate components of the total charge for transportation must be separately determined, does not support the contention that the terminal charge must be separately considered when the question under consideration is whether or not one shipper is preferred over another under Section 2. The Commission has taken this view of the matter. In *Cattle Raisers' Association v. Ft. Worth & D. C. Ry. Co.*, (1898) 7 I. C. C. 513, the Commission, although recognizing that the reasonableness of a terminal charge must be separately considered (p. 538), held that the absorption of a terminal charge in one instance, and failure to absorb such a charge in another, does not constitute unjust discrimination under Section 2 unless the line-haul transportation in both instances is between the same points, over the same railroad, and in the same direction (pp. 539-540). Whether or not one shipper is favored over another in the matter of transportation can be determined only by considering the total charges for the line-haul transportation and the loading service, if any.

Appellant also states that the issue framed by the order of the Commission instituting the investigation requires the application of Section 2 to the loading charges and services independent of all other charges and services; that if Section 2 is inapplicable because the destinations are different, then the aggregate charges for the line-haul services plus the loading services must have been in issue, but that the line-haul services and charges were not in

issue before the Commission, nor did respondents before the Commission include the connecting railroads making up the through routes to the Southeast; and that "If thus appears that there was no issue under which the Commission could have dealt with the lawfulness of the aggregate of line-haul charges and of loading charges, even if it had so desired" (Br. p. 41).

The Commission necessarily suspended only the rate schedules published by appellees providing for the removal of the loading charge theretofore applied on cotton transported from Oklahoma to the Texas Gulf ports and Lake Charles, Louisiana. It could not have suspended the line-haul rates for the movement of traffic from Oklahoma to the Southeast because they had already become effective. The Commission could have refused to suspend the tariffs providing for elimination of the loading charge because of the obvious inapplicability of Section 2, except for the fact that the provisions of Section 3(1) of the Act hereinafter discussed were also involved. Appellant was by the order of suspension afforded an opportunity to establish its contention that the provisions of Section 3(1) had been violated. The lawfulness of the loading charge or its removal may, of course, be considered along with the line-haul rates for transportation, despite the fact that such line-haul rates are not placed in issue. They may be added to the loading charge, if any, in determining the total aggregate charges for transportation without challenging the reasonableness or lawfulness thereof.

Inasmuch as appellant's shipments of cotton are not made from and to the same points, or over the same routes of movement as shipments of cotton from Oklahoma to the Texas Gulf ports and Lake Charles, La., the provisions of Section 2 of the Act do not have application, and it is unnecessary to consider whether differences in circumstances and conditions exist between appellant's shipments and the shipments to the Texas Gulf ports, within the

purview of Section 2. It may not be amiss, however, to point out the appellant's shipments are not made under the same circumstances and conditions as shipments from Oklahoma to the Texas Gulf ports inasmuch as the shipments from Oklahoma to the Texas Gulf ports are on a relatively higher rate basis than the shipments from Oklahoma to the Southeast, constituting a difference in circumstances and conditions justifying dissimilar treatment under Section 2 (R. 137). Certainly the matter of the relative profit earned from transportation over different routes of movement is a circumstance which must be considered. In *Texas & Pacif. Ry. Co. v. Interstate Commerce Commission* (1896), 162 U. S. 197, 233, the Supreme Court stated "in passing upon questions arising under the act, the tribunal appointed to enforce its provisions . . . should consider the legitimate interests as well of the carrying companies as of the traders and shippers."

In conclusion of law No. 4, the District Court stated that, in determining whether or not the provisions of Section 2 of the Interstate Commerce Act have been violated by the publication of the tariffs under consideration, "the Commission properly considered the dissimilarity in circumstances and conditions between the line-haul movement of cotton from Oklahoma origins to the Southeast and the line-haul movement of cotton from the Oklahoma points to the Gulf ports . . ." (R. 84). For reasons hereinabove stated, the conclusion thus announced by the District Court is entirely sound and proper.

Section 3(1).

Section 3(1) of the Act provides that

"It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, . . . or any particular description of traffic, in any respect whatso-

ever; or to subject any particular person, * * *, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage, in any respect whatsoever: * * *.

However, the absence of truck competition from points in Oklahoma to the Southeast as compared with the intense truck competition existing between Oklahoma and the Texas Gulf ports and Lake Charles, La., and the maintenance of relatively lower rates for transportation of cotton from Oklahoma to the Southeast than to the Texas Gulf ports and Lake Charles, La., constitutes dissimilarity of circumstances and conditions which justifies cancellation of the loading charge in the case of shipments destined to the Gulf ports and its continuance in the case of shipments destined to the Southeast, without violation of the provisions of Section 3(1).

Competition between rail carriers which affects the level of rates and charges for transportation was recognized many years ago as a factor warranting difference in the rate levels between different origins and destinations. The Supreme Court so held in *Texas & Pacific Ry. Co. v. Interstate Commerce Commission* (1896), 162 U. S. 197, 233-234, and reaffirmed its decision in *Interstate Commerce Commission v. Alabama Midland Ry.* (1897), 168 U. S. 144, 166.

Following the principles thus declared by the Supreme Court in the above decisions, the Commission has uniformly and consistently held that the existence of truck competition at one point and not another; or in greater degree at one point than another, warrants the imposition of lower rates at the point of competition or at the point of greatest competition, and that such dissimilarity in treatment does not constitute undue preference or undue prejudice. *Rate Structure Investigation, Part III, Cotton* (1931), 174 I. C. C. 9, 17; 176 I. C. C. 249, 253; *Solar Refining Co. v. Ann Arbor R. Co.* (1932), 182 I. C. C. 693, 697;

Consolidated Southwestern Cases (1932), 185 I. C. C. 357, 363; 188 I. C. C. 307, 309; *Cotton Exchange of Augusta v. A. C. L. R. Co.* (1932), 190 I. C. C. 513, 518; *Commodity Rates in Official Territory* (1935), 209 I. C. C. 703, 705; *Sugar from California to Chicago* (1935), 211 I. C. C. 239, 254; *Hudson County Coal Dealers Assn. v. C. R. R. Co. of N. J.* (1937), 219 I. C. C. 676, 681.

In *Railroad Commission of Wisconsin v. Ann Arbor R. R. Co.*, 177 I. C. C. 588, the Commission found that the addition of the transfer charge at Chicago to the charges of rail carriers for passenger transportation between Wisconsin and the southern peninsula of Michigan, while not adding such charge in the case of through fares of the rail carriers for transportation between other territories via Chicago, was not unreasonable, unjustly discriminatory, or unduly prejudicial. The Commission stated (p. 592):

"Upon consideration of the whole record we are of the opinion and find that the addition to the through fares assailed of the charge for transfer between stations at Chicago is not unreasonable, and that the difference in competitive conditions affecting the transportation between territories where the transfer charge is absorbed, and those here considered where it is not, are sufficient to justify the practices complained of and consequently to make any discrimination and prejudice which may exist by reason of the absorption in the one instance and not in the other, neither unjust nor undue."

Appellant admits that competition between carriers warrants the establishment and maintenance of rates and charges which might otherwise constitute a violation of Section 3(1). At page 46 of its brief, it states that this Court has recognized that competition with other carriers may serve to justify a relation of rates which otherwise would appear to be unfair and prejudicial under Section 3(1), and that its claim of error involving the Commission's consideration of the difference in truck compe-

tion is, therefore, restricted to its discussion of the case under Section 2.

Relative profit to the carrier is a further circumstance which warrants a difference in the rates and fares charged shippers under the provisions of Section 3(1). More than a half century ago, in *Interstate Commerce Commission v. Baltimore & Ohio R. R. Co.* (1890), 43 Fed. 37, 53, Circuit Judge Jackson, whose judgment was later affirmed by the Supreme Court (145 U. S. 263), stated that the fair interest of the carrier and the relative cost of service and profit to the company were factors which might properly be considered:

"The English cases referred to above, and others that might be cited, establish the rule that, in passing upon the question of undue or unreasonable preference or disadvantage, it is not only legitimate, but proper, to take into consideration, besides the mere differences in charges, various elements, such as the convenience of the public, the fair interest of the carrier, the relative quantities or volume of the traffic involved, the relative cost of the services and profit to the company, and the situation and circumstances of the respective customers with reference to each other, as competitive or otherwise" (pp. 53-54).

Judge Jackson's opinion was later referred to with approval by this Court in *Texas & Pacific Ry. Co. v. Interstate Commerce Commission* (1896), 162 U. S. 197, 233, wherein the Court held that in passing upon questions arising under the Interstate Commerce Act, the tribunal appointed to enforce its provisions should take into consideration "the legitimate interests . . . of the carrying companies . . .". It was also cited with approval by the district court in *McNeil and Sons v. Western Maryland Ry. Co.* (1930), 42 Fed. (2d) 669, 675-676; affirmed 51 Fed. (2d) 1073; petition for writ of certiorari denied, 284 U. S. 665.

That carriers may properly consider the relative yield under rates applicable between different origins and destinations in determining the privileges which shall be accorded thereunder, is undoubted. In *Cotton from and to Points in Southwest and Memphis*, 208 I. C. C. 677, at page 724, the Commission stated:

"The practices which may have prevailed in the past with respect to free transit are no criteria in the present circumstances. In the past there was substantially no unregulated competition and the rates were not depressed. If the carriers gave a free service in one instance it was not unreasonable to expect them to give it in another. Now the situation has changed. In the present circumstances it is not only the carriers' right but their duty to conduct their operations in the most economical manner possible, in order to retain the greatest net revenue out of the low competitive rates which they are compelled to charge. The fact that they have provided certain transit services without charge in addition to the transportation rates, in instances where that seems to be good business policy from a competitive standpoint, affords no basis for requiring them to assume the additional burden and expense incident to such services where the opportunities for corresponding benefits to them are lacking" (p. 724).

Moreover, in *Routing Cottonseed to Kansas and Missouri*, 231 I. C. C. 775, 779, the Commission held that the action of certain carriers in according lower cut-back rates when they retained the long hauls on the outbound products than when they received lesser hauls on the outbound products, constituted a sufficient difference in circumstances and conditions to relieve them of the charge of unjust discrimination. The Commission stated:

"Protestants further contend that when there are two mills located at the same point on respondents' lines an unlawful situation would be created if one mill shipped out over a route which entitled it to the cut-back rates while the other did not. Apparently

the same situation prevails today. This is simply a matter of a mill availing itself of the cut-back rates, with their limitations, or not doing so. Differing circumstances and conditions may justify differences in charges. In the present situation the fact that respondents are accorded their long haul on the out-bound-products movement is a sufficient difference in circumstances and conditions to justify assessing, in connection with such movements, the lower cut-back rates in lieu of the higher gross local rates" (P. 779).

The foregoing decisions of the courts and the Commission establish that the relative earnings of carriers for transportation between different origins and destinations, as well as difference in competitive conditions, constitute justification for difference in the services accorded shippers, without violation of the prohibitions of Section 3(1).

Manifestly, the fact that the rates for line-haul transportation between Oklahoma and the Southeast are on a relatively lower basis than like rates for such transportation between Oklahoma and the Texas-Gulf ports, warrants the continuance of the loading charge from Oklahoma to the Southeast and its elimination from Oklahoma to the Texas Gulf ports and Lake Charles, La.

Appellant does not contend that differences in the matter of truck competition and in the level of rates for transportation do not represent dissimilar circumstances which may be taken into account in considering whether there has been a violation of the provisions of Section 3(1). It argues only that the lawfulness of the free-loading provision contained in the tariffs under consideration must be determined independently without consideration of the effect thereof upon the line-haul rates for transportation (Br. pp. 46-48). For reasons already stated in the discussion under Section 2, this contention is erroneous. The loading service represents but a component part of the entire service of transportation and cannot rightly be viewed

independently in determining the matter of undue preference and undue prejudice under Section 3(1).

In conclusion of law No. 4, the District Court stated that in determining whether or not the provisions of Section 3(1) of the Interstate Commerce Act have been violated by the publication of the tariffs under consideration, the Commission properly considered the dissimilarity in circumstances and conditions between the line-haul movement of cotton from Oklahoma origins to the Southeast and the line-haul movement of cotton from Oklahoma points to the Gulf ports (R. 84). For reasons hereinabove stated, the conclusion thus stated by the District Court is entirely sound and proper.

The Order of the Commission Is Adequately Supported by Essential Findings.

Appellant contends that the order of the Commission is not supported by findings sufficient to disclose a correct application of statutory standards (Br. pp. 25-31). It does not, of course, assert that the Commission failed to make an ultimate finding respecting the lawfulness of the tariffs under consideration, inasmuch as the Commission expressly held that "the elimination of the rail carriers' loading charge on cotton originating in Oklahoma on respondents' lines, compressed in transit and moving from compress point to Texas-Gulf ports and Lake Charles, La., at the carload rate from origin point, is just and reasonable and not shown to be otherwise unlawful" (R. 31-32). It alleges only that the Commission omitted to make "preliminary" findings upon which such ultimate finding was based (Br. p. 26).

By the terms of Section 14 of the Interstate Commerce Act, it is provided that whenever an investigation is made by the Commission "it shall be its duty to make a report in writing . . . which shall state the conclusions of

the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded, such report shall include the findings of fact on which the award is made." It is necessary only that the Commission state its conclusions, unless damages are to be awarded.

Examination of the report and order of the Commission in I. & S. No. 4981, under consideration herein, reveals that the Commission fully complied with the statutory provisions and the court decisions interpreting the same. Formal and precise findings are not required. It is not the form but the substance of the findings that controls. It is enough if the findings be stated, whether in narrative form or otherwise, in such fashion that it definitely appears upon what facts the Commission reached its decision. *Quannah, A. & P. Ry. Co. v. United States*, (1939) 28 Fed. Supp. 916, affirmed 308 U. S. 527; rehearing denied 309 U. S. 694. See also *Davidson Transfer & Storage Co. v. United States*, (1942), 42 Fed. Supp. 215, affirmed 87 L. ed. 21.

In *Quannah, A. & P. Ry. Co. v. United States*, *supra*, the statutory court, composed of Hutcheson, Circuit Judge, and Bryant and Davidson, District Judges, had under consideration an order of the Commission cancelling a transit arrangement whereby products milled from cottonseed, moved in carloads into certain milling points, could be shipped to final destination at the through railroad rate from points where the cottonseed originated. In disposing of plaintiff's contention that the order was void because unsupported by requisite findings, the court stated:

"We may agree with the plaintiff that the report of the Commission would have been better drawn if instead of the finding 'we find that the proposed schedules have not been justified,' there had been a positive finding that 'the proposed schedules are unjust and unreasonable, and unduly prejudicial in violation of the Act.' We are not in any doubt, though,

that when read in connection with the positive and definite finding that the schedules must be cancelled, and in the light of the detailed findings in the report, the finding in question must be taken to be a finding that the condemned practice is unreasonable and violative of the Act; nor are we in any, that plaintiff's first point, that the order falls for want of definite findings, must be rejected" (p. 917).

Then, after reviewing the extent to which the Commission's report analyzed the physical and economic factors which entered into and affected the proposed arrangement and the injurious results which would follow the institution of the practice, the loss of revenues to the contesting rail carriers in the general disruption of working rates and arrangements with resulting confusion and loss to all concerned, the court concluded:

"Under the settled rule that it is not the form but the substance of the findings and order which controls, these findings are ample. *Powell v. United States*, 300 U. S. 276, 57 S. Ct. 470, 81 L. Ed. 643; *Alton Railroad Company v. United States*, 287 U. S. 229, 53 S. Ct. 124, 77 L. Ed. 275; *United States v. Louisiana*, 290 U. S. 70, 54 S. Ct. 327, 78 L. Ed. 181; *Manufacturers Ry. Co. v. United States*, 246 U. S. 457, 490, 38 S. Ct. 383, 62 L. Ed. 831; *Florida v. United States*, 282 U. S. 194, 51 S. Ct. 119, 75 L. Ed. 291" (p. 918).

The report of the Commission under consideration herein bears a close resemblance to the report reviewed by the statutory court in the foregoing proceeding. The Commission did not specifically find that the cancellation of the loading charge was lawful and proper in terms of the provisions of Sections 2 and 3(1), but found that the cancellation of the loading charge was "just and reasonable and not shown to be otherwise unlawful" (R. 31-32). It had previously stated that "from the evidence presented in the instant proceedings it has not been shown that any provisions of the Interstate Commerce Act would be vi-

olated if the suspended Oklahoma rule is permitted to become effective" (R. 30).²

Like the report considered in the *Quannah* case, the report is not couched in terms of the precise language contained in Sections 2 and 3(1). However, the language of the Commission is the equivalent of a finding that the cancellation of the loading charge is not in violation of Sections 2 or 3(1). This is acknowledged by appellant at page 26 of its brief. Such an ultimate finding has been held to be all that is required in the disposition of an issue under Section 3. *Chesapeake & Ohio Ry. Co. v. United States*, 11 Fed. Supp. 588, 593, affirmed 296 U. S. 187.

Moreover, examination of the Commission's report clearly reveals the basis of its ultimate finding, and discloses the facts and circumstances upon which it was predicated. The Commission analyzed the situation leading to the cancellation of the loading charge at considerable length, and described the trucking competition encountered by the carriers between Oklahoma and the Texas Gulf ports and its absence between Oklahoma and the Southeast and the relative levels of rates to the different destinations. This is all that is required. As stated by the Supreme Court in *Colorado v. United States*, (1926), 271 U. S. 153, 169, "an examination of the extensive record and of the * * * opinions of the Commission convinces * * * that no relevant fact was ignored, that there was ample evidence to support the facts found, * * *"

Appellant's insistence that the Commission erred in failing to make specific findings under Section 2 does not merit serious consideration. The provisions of Section 2, as above indicated, have application only when shipments move from and to the same points over the same routes of movement. Obviously, plaintiff's shipments from Oklahoma to the Southeast do not move from and to the same points or via the same routes of movement as does cotton shipped by other shippers from Oklahoma to the

Texas Gulf ports. Finding to that effect would have been entirely superfluous.

The absence of truck competition from Oklahoma to the Southeast and relatively lower rail rates from Oklahoma to the Southeast, as hereinbefore indicated, constitute dissimilar circumstances which justify continuance of the loading charge on cotton from Oklahoma to the Southeast and its elimination from Oklahoma to the Texas Gulf ports.

Appellant contends that these facts are not specifically embraced in Commission findings (Br. pp. 26-27). True, they are not set forth in the portion of the Commission's report in which are stated certain "pertinent facts" (R. 30-32; 248 I. C. C. 653-654), but they are stated elsewhere in the report. The Commission points out that reductions were made in through rates for the purpose of more adequately meeting truck competition (R. 22); that the competition with trucks in Texas was found to be greater to the Gulf ports than from Oklahoma points to the Gulf ports (R. 24); that cotton is handled by truck from gin points to compress stations and interstate destinations and by truck from compress stations in Oklahoma (R. 22-23); that there is no trucking of cotton from Oklahoma to Memphis or to the Southeast (R. 23); and that the rates to the Southeast are lower relatively than they are to the Texas ports (R. 23). (248 I. C. C. 648-650.)

Obviously, reduction in through rates to meet truck competition is recognition of the existence of truck competition between Oklahoma and the Texas ports. The movement of cotton by truck from gin points to compress points is likewise indicative of the existence of through truck competition since cotton which is trucked into a compress point normally may be expected to be trucked from such compress point to the Texas-Gulf ports. In its report the Commission quotes with approval from statement made by it in *Cotton From and To Points In Southwest and Memphis*, 208 I. C. C. 677, 695, to the effect that "most of the railroads

concerned are apprehensive, and apparently with good reason, that once the cotton is on a truck it may be carried by the truck all the way to a port * * * (R. 22).*

Appellant contends that such statements merely represent a recital of the contentions of the respondents in I. & S. No. 4981 (Br. pp. 27-31). This contention is unsound. The existence of the facts above discussed was established by the testimony of respondents' witnesses and was supported by factual data contained in the record. The fact that the Commission, upon consideration of such testimony and data, has accepted the proof offered by respondents in respect thereto, does not relegate such statements to the status of a mere recital of the contentions of respondents.

Despite the fact that appellant contends that the Commission failed to make findings sufficient to disclose a correct application of statutory standards, seemingly it does not entertain any doubt respecting the factors which prompted the Commission's decision. In Petition for Reconsideration filed by it with the Commission under date of February 18, 1942 (R. 35), it argued that Division 3 erred in its report of January 29, 1942, in the following particulars:

"1. In finding that there is a difference in circumstances and conditions surrounding cotton shipped from Oklahoma to the gulf ports, on the ~~one~~ hand, and cotton shipped from Oklahoma to the southeast and the Carolinas, on the other hand, in the matter of truck competition encountered by the respondents.

2. In finding that the line-haul rates on cotton, in carloads, from Oklahoma to the southeast are relatively lower than to the Texas ports" (R. 35).

From examination of the statements made by the Commission in its report, it is manifest that the Commission made essential findings of fact and that Finding 24 of the District Court is proper.

* Quoted with approval by several witnesses for respondents (R. 116, 154). One of them testified that cotton that is trucked from a compress is ordinarily cotton that was trucked to the compress (R. 140).

The Order of the Commission Is Adequately Supported by the Evidence.

In a long line of decisions the Supreme Court has held that as long as there is warrant in the record, the judgment of administrative tribunals, such as the Interstate Commerce Commission, must stand; that the determinations of such bodies will not be set aside if there is evidence to support them, even though the court considering the matter independently might have reached a different conclusion. The judicial function is exhausted when the court finds that there is a rational basis for the conclusion reached. For recent decisions so holding, see: *Swayne & Hoyt, Ltd. v. United States* (1937), 300 U. S. 297, 304; *Rochester Telephone Corporation v. United States* (1939), 307 U. S. 125, 145-146; *United States v. Lowden* (1939), 308 U. S. 225, 231; *Labor Board v. Link-Belt Co.* (1941), 311 U. S. 584, 597.

Whether discrimination in rates or services of a carrier is undue or unreasonable has always been regarded as peculiarly a question committed to the judgment of the administrative body based upon the application of an informed judgment to all the facts and circumstances affecting the traffic. What amounts to such discrimination is a question, not of law, but of fact, with which the administrative body was created to deal. *Swayne & Hoyt, Ltd. v. United States* (1937), *supra*; *United States v. L. & N. R. Co.* (1914), 235 U. S. 314, 320; *Pennsylvania Co. v. United States* (1915), 236 U. S. 351, 361; *Manufacturers Ry. Co. v. United States* (1918), 246 U. S. 457, 482; *United States v. Chicago Heights Trucking Co.* (1940), 319 U. S. 344, 352-3.

Appellant admits that the evidence supports the statements made in the report of the Commission respecting the difference in truck competition between Oklahoma and the Texas ports and between Oklahoma and the Southeast (Br.

32).^{*} It contends only that such statements and the evidence in support thereof fail to show a difference between cotton handled from gin to compress which is later reshipped to the Southeast, on the one hand, and cotton handled from gin to compress which is later reshipped to the Texas ports, on the other hand (Br. 32). For reasons hereinbefore stated, appellant's position in this respect is entirely fallacious. It is the truck competition between Oklahoma and the Texas ports and the absence of such competition between Oklahoma and the Southeast which constitutes the dissimilar circumstance justifying removal of the loading charge in the case of shipments destined to the Texas ports and its continuance in the case of shipments destined to the Southeast.

Appellant also contends that the record is devoid of evidence from which the Commission could properly find the existence of a relatively lower basis of rates between Oklahoma and the Southeast than between Oklahoma and the Texas ports. This contention is equally erroneous. In the course of his testimony, one of the witnesses for the respondents before the Commission stated that a further justification for failure of respondents to remove the loading charge in the case of cotton destined to the Southeast was the fact that "the rates to the Southeast are already lower, relatively, than they are to the ports" (R. 137). Appellant states that the witnesses did not elaborate on the actual statement just quoted (Br. p. 32). However, the witness' testimony stands entirely unchallenged and uncontradicted. Appellant was represented at the hearing by counsel and offered testimony through a witness. It made no effort to refute witness for respondents' assertion in this connection.

Another witness for respondents presented Exhibits 32 to 39 inclusive (R. 269-273), which consist of maps and comparative statements of distances, rates, earnings per

^{*} For evidence respecting the matter, see R. 115-122, 137-139.

ton-mile and per car-mile from Oklahoma origins to Houston, Texas, and to Southeast destinations. The data contained in these exhibits establish that relatively lower earnings per ton-mile and per car-mile are derived by the carriers from the present carload rates on cotton from Oklahoma to points in the Southeast than from Oklahoma to the Texas Gulf ports. For example, Exhibit 38 shows that the earnings produced by the rates on cotton between Oklahoma City and Columbia, S. C. vary between 11.2 mills per ton-mile and 13.7 mills per ton-mile and between 17.2 cents per car-mile and 29.1 cents per car-mile, whereas similar earnings received by the carriers from rates on cotton between Oklahoma City and Houston, Texas, vary between 17.7 mills per ton-mile and 23.8 mills per ton-mile and between 30.1 cents per car-mile and 57.4 cents per car-mile (pp. 2, 3). The comparative earnings thus shown by Exhibit 38 corroborate the undisputed testimony of the witness for respondent to the effect that the rates to the Southeast are relatively lower than the rates to the Texas ports.

Generally speaking, as stated by appellant (Br. 33-34), the unit cost of transportation diminishes with increased length of haul, and Columbia, S. C. is further distant from Oklahoma City than is Houston, Texas (1193 v. 453). But the rate of progression in distance rate scales is not governed entirely by cost considerations.* The per ton-mile and per car-mile earnings produced by the rates applicable between Oklahoma City and Houston would not be so much greater than similar earnings under the rates applicable between Oklahoma City and Columbia if cost alone had been the controlling element in the determination of the distance scales between such points.

* *Southern Class Rate Investigation*, 100 I. C. C. 513, 630-631; *Consolidated Southwestern Cases*, 205 I. C. C. 601, 642-646; *Western Trunk-Line Class Rates*, 164 I. C. C. 1, 189-190; *Grain Case Modifications*, 223 I. C. C. 235, 243.

The Commission had available for its consideration the data contained in Exhibits 33 to 39 inclusive. It was acquainted with the history of the rate scales in question and the economic and other considerations involved in their construction. In its report, it quoted from its decision in *Cotton from and to Points in Southwest and Memphis*, 208 I. C. C. 677, 718, wherein it stated "It is conceded that the rates to southern mill points from Oklahoma are graded up very slowly as the distance increases * * *", (R. 24) (248 I. C. C. 643, 650). Its conclusion that "the rates to the Southeast are relatively lower than to the Texas-Gulf ports" (R. 24), is unquestionably supported by the evidence.

Appellant's contention that the record contains no other evidence bearing upon the question of relative levels of line-haul rates between Oklahoma and the Texas ports and between Oklahoma and the Southeast, than that offered by witnesses for respondents, is patently erroneous (Br. p. 33). Mr. C. B. Bee, Traffic Adviser and Special Counsel for the Corporation Commission of the State of Oklahoma, which maintains a department especially for the purpose of looking after interstate railroad rate matters in Oklahoma, testified that rates on cotton from Oklahoma to the Southeast are relatively more depressed than rates on cotton from Oklahoma to the Texas ports. In response to the question whether the same reductions in rates on cotton were not made from Oklahoma to the Southeast as were made in the preceding year from Oklahoma to the Texas ports, he stated:

"No, sir, not relatively. That is just exactly the point; the same reductions in cents per hundred pounds were made to the Southeast, but not relatively as to cost, I wouldn't say. If you will take your rate from Oklahoma to the Southeast, and the rates from Oklahoma to the Gulf, and measure them on a mileage basis, the rates from Oklahoma to the Southeast are much lower, and, therefore, I think that you might put 5

cents or 5½ cents a bale into the one rate, and not into the other, and still not have discriminatory conditions" (R. 247-248).

In Finding 21, the District Court stated that the evidence before the Commission was confined to a comparison of the rates, distances, ton-mile earnings and car-mile earnings involved and that no evidence was offered as to the specific costs of the respective line-haul services or as to any transportation circumstance and condition incident to line-haul services other than the mere matter of distance (R. 82). Manifestly, this particular finding of the District Court is in error. The record contains the unchallenged and undisputed testimony of Mr. Bee, the traffic expert for the Oklahoma Commission, to the effect that rates to the Southeast are relatively more depressed than rates to the Texas ports in consideration of "cost."

Appellant further contends that the lawfulness of rates and charges depends on many elements and facts and that if the Commission erred as to one factor only on which it relied in its final determination, its order should nevertheless be enjoined because this Court is not in a position to say that the Commission would have come to the same ultimate conclusion if that factor be laid aside from view (Br. p. 34). Appellant thus argues that the order should be enjoined for lack of evidence respecting the relative level of the line-haul rates *despite the fact that appellant itself admits the difference in truck competition which was also relied upon by the Commission.*

Appellant's contention in this respect is, of course, incorrect. Both the difference in the level of line-haul rates and difference in truck competition are adequately supported by the evidence. However, difference in truck competition alone is sufficient to support the order. The existence of truck competition at one point and not at another, as previously discussed herein, amply warrants a differ-

ence in rates and charges without offending the provisions of Section 3(1). The fact that another similarly valid difference may not be found to exist does not render the Commission's order invalid.

CONCLUSION.

Railroad appellees respectfully submit that the decree of the District Court should be affirmed.

Respectfully submitted,

R. S. OUTLAW,

ROLAND J. LEHMAN,

1211 Railway Exchange,
Chicago, Illinois,

C. S. BURG,

Railway Exchange,
St. Louis, Missouri,

W. E. DAVIS,

K. C. S. Building,
Kansas City, Missouri,

CLINTON H. MCKAY,

Exchange Building,
Memphis, Tennessee.

*Attorneys for Railroad
Appellees.*

APPENDIX A.

*Pertinent Provisions of the Interstate Commerce Act,
as Amended.*

The Interstate Commerce Act, as amended, is found in Title 49, U. S. C., 1940 Edition. The section numbers in Title 49 of the U. S. Code are the same as in the Interstate Commerce Act, as amended.

SECTION 1(3)(a)-(49 U. S. C. 1(3)(a)).

(Paragraph 3(a) of Section 1 defines the term "transportation," used in the Act, as including all services in connection with the handling of property transported.)

(3) (a) The term "common-carrier" as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this part it shall be held to mean "common carrier." The term "railroad" as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

The term "person" as used in this part includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof.

SECTION 2 (49 U. S. C. 2).

(Section 2 prohibits and declares to be unlawful unjust discrimination and defines what constitutes unjust discrimination.)

SEC. 2. That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

SECTION 3(1) (49 U. S. C. 3(1)).

(Paragraph (1) of Section 3 provides that undue preference and undue prejudice shall be unlawful.)

(1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination,

prejudice, or disadvantage to the traffic of any other carrier of whatever description.

SECTION 6(1) (49 U. S. C. 6(1)).

(Paragraph (1) of Section 6 requires carriers to publish and file all rates and charges and to separately state all terminal charges which affect the aggregate thereof.)

(1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part.

SECTION 14(1) (49 U. S. C. 14(1)).

(Paragraph (1) of Section 14 requires that the Commission make a report and state its conclusions.)

(1) That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

SECTION 15(1) (49 U. S. C. 15(1)).

(Paragraph (1) of Section 15 confers power on the Commission to prescribe lawful charges in lieu of those found to be unlawful after hearing on complaint or on its own motion.

(1) That whenever, after full hearing, upon a complaint made as provided in Section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be there-

after followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist; and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

SECTION 15(7) (49 U. S. C. 15(7)).

(Paragraph (7) of Section (15) confers on the Commission the power to suspend and investigate changes in rates and charges and to prescribe lawful charges in lieu of those found to be unlawful after full hearing.)

(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had

become effective. If the proceeding has not been concluded and an order made within the period of suspension proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of the period; but in case of a proposed increased rate or charge for or in respect to the transportation of property the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

cluded.
n, the
egula-
such
charge
e, the
carrier
counts
whom
com-
order
with
counts
arges
t any
clas-
r the
arden
pro-
regu-
mmis-
ques.
before

FILE COPY

Office - Supreme Court, U. S.

RECEIVED

MAY 13 1943

CHARLES ELLIOTT CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 520

L. T. BARRINGER AND COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION, THE ATCHISON,
TOPEKA AND SANTA FE RAILWAY COM-
PANY, *et al.*,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TENNESSEE.

PETITION OF APPELLANT FOR REHEARING

LUTHER M. WALTER,
JOHN S. BURCHMORE,
NUEL D. BELNAP,

Counsel for Appellant.

TABLE OF CONTENTS.

	PAGE
The lack of adequate findings.....	2
The decision under Section 2.....	5

TABLE OF CASES.

Absorption of Loading Charge (1930), 161 I. C. C. 389.....	8
Allowance for Driving Horses at Miles City, Mont. (1938), 227 I. C. C. 387.....	8
Archer-Daniels-Midland Co. v. Alton R. Co., 246 I. C. C. 421.....	14, 15
Atkinson Milling Co. v. Chicago, M., St. P. & P. Ry., 235 I. C. C. 391.....	16, 18
Board of Trade of Kansas City v. United States, 314 U. S. 534.....	9
Cairo Association of Commerce v. Angelina & N. R. R. Co., 160 I. C. C. 604.....	16
Cairo Board of Trade v. C., C., C. & St. L. Ry. Co., 46 I. C. C. 343.....	16, 17
Central Pennsylvania Coal Producers Association v. B. & O. R. Co., 196 I. C. C. 203.....	18
Drayage Absorption's by S. W. M. R. R. Co. (1926), 113 I. C. C. 179.....	8
Fraser-Smith Co. v. Grand Trunk W. Ry., 185 I. C. C. 57.....	16, 18
Independent Newspapers Ltd. v. G. N. Ry. Co. (1913), 2 Ir. R. 255.....	10

Indianapolis Chamber of Commerce v. Cleveland, C. C. & St. L. Ry., 46 I. C. C. 547.....	16
Interstate Commerce Commission v. Alabama M. R. Co., 168 U. S. 122.....	8, 9
Interstate Commerce Commission v. B. & O. R. Co., 145 U. S. 263.....	6
Interstate Commerce Commission v. B. & O. R. R. Co., 225 U. S. 326.....	13
Interstate Commerce Commission v. Delaware, L. & W. R. Co., 220 U. S. 235.....	13
Interstate Commerce Commission v. Stickney, 215 U. S. 98.....	14
Livestock to Eastern Destinations, 156 I. C. C. 498.....	16, 18
Manufacturers Ry. Co. v. United States, 246 U. S. 457.....	8
Minneapolis Traffic Ass'n v. Chicago & N. W. R. Co., 241 I. C. C. 207.....	14
Nebraska-Colorado Grain Producers Assn. v. C. B. & Q. R. R., 243 I. C. C. 309.....	16, 18
Phipps v. N. & W. R. Co., 2 Q. B. 229.....	6, 10
Phoenix Utility Co. v. Southern Ry., 173 I. C. C. 500.....	16
R. R. Commission of Geo. v. Clyde Steamship Co., 5 I. C. C. 324 (4 I. C. R. 120).....	5
Railroad Comm. of Wisconsin v. Ann Arbor R. Co., 177 I. C. C. 588.....	14
Richmond Chamber of Commerce v. Seaboard Air Line Ry., 44 I. C. C. 455.....	14
Seaboard Air Line Railway Co. v. United States, 254 U. S. 57.....	8, 10
State Docks Commission v. Louisville & N. R. Co., 167 I. C. C. 112.....	14

Stevens Grocer Co. v. St. Louis, I. M. & S. Ry., 42 I. C. C. 396.....	16
Switching at Minneapolis, 235 I. C. C. 405.....	16
Texas & Pacific Ry. v. United States, 289 U. S. 627.....	8, 9, 12
Tide Water Oil Co. v. Director General, 62 I. C. C. 226.....	14
United States v. Chicago Heights Trucking Co., 310 U. S. 344.....	9
Wight v. United States, 167 U. S. 512.....	8

STATUTES AND TEXTS CITED.

Charles W. Berry, "Study of Proportional Rates," 10 I. C. C. Prac. Journal, March, 1943.....	16, 17
Equality Clause	6, 10, 13
Interstate Commerce Act, Part I	
Section 1	6
Section 2	2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16
Section 3(1)	6, 9, 10, 11, 12, 13
Section 6	6
Section 15(7)	18
Interstate Commerce Act Annotated, Vol. 2.....	8
Leslie, "Law of Transport by Railway," 2nd ed.....	10
Locklin, "Economies of Transportation".....	8, 10
Sharfman, "Interstate Commerce Commission," Vol. III-B	10, 11, 12

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 520

L. T. BARRINGER AND COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION, THE ATCHISON,
TOPEKA AND SANTA FE RAILWAY COM-
PANY, *et al.*,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TENNESSEE.

PETITION OF APPELLANT FOR REHEARING

*To the Honorable the Chief Justice and the Associate Jus-
tices of the Supreme Court of the United States:*

Appellant respectfully applies, pursuant to Rule 33 of
the Revised Rules of this Court, for a rehearing of the
decision of this Court in the above-entitled cause on the
grounds (a) that the Court failed to consider and dispose
of substantial questions as to the sufficiency of the Com-

mission's findings; and (b) that in disposing of the case under Section 2, the Court has not had the benefit of oral argument on the precise point decided in the opinion of the majority; that the effect of the decision is to overrule prior cases in this Court long considered as controlling authorities, although there is no clear statement to the effect in the opinion; and that the opinion of the majority rests on a misapprehension of the force and significance of the cases cited therein. These will be treated in the order stated.

THE LACK OF ADEQUATE FINDINGS

The opinion of the Court fails to consider and dispose of appellant's contention that the order, and ultimate conclusion of the Commission is not supported by adequate findings regarding the claimed differences as to either truck competition or relative rate levels.

In the case of the claimed differences in truck competition, the defect rests on the absence from the report of any statement whatsoever as to the existence of truck competition from Oklahoma gin points¹ to the Texas ports. (See appellant's principal brief, pp. 27-28; reply brief, pp. 19-21.) The opinion of the majority apparently proceeds on the assumption that the Commission made such a finding. The dissenting opinion of Mr. Justice Douglas states definitely that the Commission found that "there is considerable truck competition in the movement of cotton from Oklahoma to the Texas Gulf ports." It thus appears that all members of the Court labored under a misapprehension as to this lack of a finding as to a factual matter

¹ The loading charge in issue applied *only* at the gin origin at the inception of the gin-to-compress move. Consequently, any statement as to truck competition from an Oklahoma compress to the Texas Gulf ports does not touch the real case.

which the Court treated as controlling within the discretion of the Commission.

Furthermore, the Court overlooked the finding in the report of the Commission that the keen truck competition is from gin origin to compress point (R. 24, 248 I.C.C. 649). That finding is actually as to a similarity of conditions, since such competition is encountered to an equal degree by all cotton, regardless of ultimate destination.

With regard to the finding that the "rates to the Southeast are already lower relatively than they are to the Texas ports," appellant contends that a finding so phrased is without significance and effect, a question not considered in the opinion of the Court.

Accepting, *orguendo*, the views of the majority as to relevancy, the matter of relative rate levels bears directly upon the particular discrimination in issue only if the line-haul rates to the Southeast are lower in relation to cost, or some other accepted transportation standard, than are the line-haul rates to the Texas ports. Only in such a case could the Commission rationally conclude that the addition of a loading charge to such subnormal rates would produce an aggregate charge which would not be out of line with the aggregate to the Texas ports when measured by the same standard, so as to excuse the apparent discrimination.

The theory of the majority opinion is that appellant is not injured and has no right to relief if the same change might have been fairly made in the line-haul rates. While it is not stated in the opinion, the Court must have taken the view that such a change could not fairly be made unless the rates to the Texas ports were higher than they should be as compared with the rates to the Southeast as measured by the transportation standard, such as relative net return.

If that were, as it should be, the view of the Court, it overlooked the admission of the Commission on brief that the finding above quoted is not to be read as meaning that the rates to the Southeast are relatively lower than to the Texas ports "so far as the net return which they brought to the carrier was concerned." (Br. 21) This concession is the equivalent of saying that the report contains no finding which would be sufficient to provide rational support for an order approving a change in the line-haul rate factors when considered independently and solely from the standpoint of relative levels. It must, therefore, follow that the same inadequate finding will not support the approved change in total charges brought about by the remission of the loading charge to the Texas ports.

The significance of the admission just mentioned, which makes meaningless a finding which the Court treated as of consequence, is emphasized by the lack of any actual evidence as to relative rate levels. (See pages 33 to 35 of appellant's principal brief, with many cases cited.)

While the Commission is experienced and expert in rate regulations so that its judgment should not be disturbed other than for impelling reasons of law, it is not too much to ask that the rationale of every decision be disclosed by the report. In this case, the items in the report do not add up to the ultimate conclusion expressed. Administrative processes are strengthened, not weakened, when this Court insists on rational and sufficient findings. Human mistakes are more likely avoided when a report of the administrative body proceeds along the path of reason from a stated premise to a final conclusion. Such an insistence is not an unwarranted interference with the administrative body, although it does constitute a restraint thereon which is essential to the proper administration of justice for which this Court stands.

THE DECISION UNDER SECTION 2

As appellant reads the majority opinion, it holds: (1) that a mere difference in destinations to which the traffic may be shipped after loading is in itself not sufficient to make Section 2 wholly inapplicable to the case, as a matter of law; (2) that it is within the Commission's administrative discretion to find that a difference in separately stated loading charges is not unjustly discriminatory under Section 2 if (subject to the requirement of support from the evidence), it finds that there are differences with respect to the line-haul which rationally might excuse such a difference in charges; and (3) that among the line-haul conditions which may rationally excuse such a difference under Section 2 are (a) differences in competitive conditions and (b) differences in the relative levels of the respective line-haul rates.

Appellant respectfully submits that rehearing should be accorded in respect to the foregoing holdings for reasons to be stated below. In presenting such reasons, appellant limits this petition to matters which apparently escaped the attention of this Court in arriving at its decision and to matters covered by the decision which appellant did not anticipate in brief and argument.

1. The foregoing holdings evidence a drastic departure from the traditional attitude of both the Commission and this Court toward Section 2 as to the character and scope of the discretion exercised in its administration.

Since the beginning of regulation, the touchstone of illegality under Section 2 has been the identity of the services involved. While discretion has extended to all questions of fact involved in the determination of identity, yet the conditions and circumstances to be examined have been treated as controlled by the words of the statute. In every case prior to this in which there has

been an unquestioned identity of physical services to which the differing charges in issue applied, the prohibition of Section 2 has been considered as applicable forthwith. All questions of equity, public interest, expediency, self interest, competition, actual damage, etc., have been wholly subordinated to the plain mandate of the statute which compels an absolute equality of charges for identical services, regardless of all else. In this respect Section 2 has been construed and applied very much as Section 6, insofar as the latter compels the collection of rates exactly as published, regardless of what might seem fair or appropriate from the standpoint of general considerations in a particular case.

This view of Section 2 precisely reflects the construction accorded by the English courts to the Equality Clause on which Section 2 is modeled, *Phipps v. N. & W. R. Co.*, 2 Q. B. 229, 249, and has been accepted without question by the Commission. *R. R. Commission of Geo. v. Clyde Steamship Co.*, 5 I. C. C. 324, 374-75 (4 I. C. R. 120.) In every case in which orders under Section 2 have been sustained, the report of the Commission discloses the exercise of discretion only within the narrow limits of the statute and the refusal of the Commission even to consider as relevant other circumstances unrelated to the physical service has been repeatedly approved. When discretion has not been exercised within the limits fixed by statute, the order has been set aside. *Interstate Commerce Commission v. B. & O. R. Co.*, 145 U. S. 263.²

In the case of Section 1, dealing with reasonableness, and of Section 3, dealing with undue preference and prejudice, the task of regulation is of infinitely greater complexity. The measure and relation of rates as con-

² Mistakenly cited at page 6 of the opinion of the majority as a case in which this Court sustained a Section 2 order.

trolled by those sections necessarily involves intricate relationships varying as to almost every factor relevant thereto. Consequently, Congress was purposely indefinite in its stipulations, and this Court has properly acknowledged the finality of the Commission's determination as to all factual questions, including the question of what conditions and circumstances should be treated as relevant.

In the case of Section 2, we have a different situation, not only with respect to the precision found in the terms of the statute but also as to the need for the exercise of discretion by the Commission in order to function as Congress intended. While broad discretion is required properly to proportion different rates to different services, little is needed merely to condemn unequal charges for identical services.

We respectfully submit that the Court has fallen into error by reason of its failure to distinguish between cases arising under Section 2 and cases arising under other sections of the Act as to the character and extent of the administrative discretion which Congress intended the Commission to exercise.

2. The Court has not had the benefit of oral argument from the parties on the question decided. On brief the Government and the Commission conceded that if the Commission based its conclusion under Section 2 on the fact that there was a difference in motor-truck competition and in the levels of rates on the respective line-hauls, it was considering factors which it was not legally entitled to consider (Br. 12, 25), but contended that the mere difference in the respective line-haul services—that is, the difference in routes and destinations—was sufficient, as a matter of law, to take the case entirely out from under Section 2 (Br. 23, *et seq.*). As to Section 2, the oral argu-

ment was accordingly confined to that narrow question of whether the section applied at all. The majority opinion disposes of the case on a different ground never before considered by the Court. Under such circumstances, appellant earnestly requests rehearing so that the Court may have the benefit of oral argument.²

3. The holding in the majority opinion that it is within the discretion of the Commission to consider differences in the matter of competition in a Section 2 case, is directly opposed to the universally accepted rule that such a difference may not be considered, this exclusion resting on a rule of law, rather than being treated as a matter of discretion. *Wight v. United States*, 167 U.S. 512, 518; *Interstate Commerce Commission v. Alabama M. R. Co.*, 168 U.S. 144, 166; *Seaboard Air-Line Railway Co. v. United States*, 254 U.S. 57, 62; Locklin, "Economies of Transportation," pp. 492-94. No rule is more firmly imbedded in the law which the Commission administers, and it has been repeatedly recognized in many cases,³ including cases involving separately stated terminal charges and services.⁴ Neither the Government nor the Commission asked, or even suggested, that the Court should overrule these prior cases.

None of the cases cited in the majority opinion holds to the contrary of those just cited. In *Manufacturers Ry.*

²In *Texas & Pacific Ry. v. United States*, 289 U.S. 627, this Court held that Section 3(1), as it then stood, could not be read as including a port within the term "locality." That point was not briefed or considered by the parties when the case was first argued. Accordingly, this Court, before deciding the case, directed that it be reargued with particular reference to the point stated.

³Many of such cases are collected in "Interstate Commerce Act Annotated," Vol. 2, p. 1093 n. 105.

⁴*Drayage Absorptions by S. W. M. R. R. Co.* (1926), 113 I.C.C. 179, 185; *Absorption of Loading Charge* (1930), 161 I.C.C. 389, 391-2; *Allowance for Driving Horses at Miles City, Mont.* (1938), 227 I.C.C. 387, 389.

Co. v. United States, 246 U.S. 457, this Court approved the refusal of the Commission to enter an order under Section 2 which was founded on a difference in circumstances and conditions directly incident to the switching services involved and not on a difference in the matter of competition, this Court saying (p. 482):

"In the present case the negative finding of the Commission upon the question of undue discrimination was based upon a consideration of the different conditions of location, ownership, and operation as between the Railway and the Terminal."

In *United States v. Chicago Heights Trucking Co.*, 310 U.S. 344, neither the Commission nor this Court sought to say that a difference in competitive conditions, if found to exist, would have excused the discrimination there found. Rather, the order of the Commission approved by this Court was squarely pitched on a finding that the physical services involved were similar, the only point of controversy. In *Board of Trade of Kansas City v. United States*, 314 U.S. 534, the issue was as to differences in aggregate line-haul charges assessed under transit arrangements. The transit services were rendered at different locations so as to make unlike the services for which the line-haul rates were paid, and neither the Commission nor this Court held that a difference in competitive conditions, if proven, would excuse what otherwise would be discriminatory under Section 2.

In *Texas & Pacific Ry. v. United States*, 289 U.S. 627, the other case cited, there was no issue under Section 2. Rather, the issue was under Section 3(1) where the rule as to the legal relevancy of competition is different, as this Court took pains to point out in *Interstate Commerce Commission v. Alabama M. R. Co.*, 168 U.S. 144. The citation of the *Texas & Pacific* case suggests that the Court has fallen to the common error of confusing "unjust

"discrimination" under Section 2 with "undue preference" under Section 3, the term "discrimination" being loosely used as if applicable to either case.⁵

Parenthetically, the order of the Commission approved by this Court in the *Seaboard Air-Line Ry.* case, *supra*, was deliberately pitched on Section 2, rather than on Section 3(1), because the unquestioned difference in competitive conditions constituted a factual defense under the latter section, although it was necessarily rejected, as a matter of law, as a defense under Section 2.

While the holding in the instant case is in conflict with the rule announced in the prior cases on which we rely, we cannot attribute to the Court an intention to overrule such cases. No party to the case requested the Court to take such action. Surely, if the Court so intended, it would not have been adverse to a clear statement to that effect. Consequently, the opinion as rendered can only result in confusion and dispute as to what is the correct rule, and uncertainty will be introduced in the Commission's administration of Section 2.

4. The majority apparently believes that Section 2 is of small consequence in a case such as this because the injury to the shipper, if any, is reflected in the total

⁵ Sec. 2, *Interstate Commerce Acts Annotated*, editorial comment at page 1106; Locklin, "Economics of Transportation," p. 495 n. 1; Sharfman, "Interstate Commerce Commission," Vol. III-B, p. 421, n. 194. However, the English courts and text writers have been exceedingly careful in keeping distinct the meaning, application, scope, and method of enforcing the sections in the English statutes on which Sections 2 and 3(1) are respectively modeled. Leslie, "Law of Transport by Railway", 2nd ed., p. 591. *Phipps v. N. & W. R. Co.*, 2 Q. B. 229, 249. Even today, the Equality Clause in the English statute is enforceable only by the courts, the administrative tribunal having no jurisdiction thereover, and the clause does not apply unless the facts as to similarity of physical services fit the case. *Independent Newspapers Ltd. v. G. N. Ry. Co.* (1913), 2 Ir. R. 255, 264.

charges paid, and because any injury resulting from the aggregate charges can be redressed in a Section 3(1) case which puts the total charges, including the line-haul rates, in issue.

In suggesting that such a view rests on a misconstruction of the statute, we urge without elaboration the views expressed in the dissenting opinion of Mr. Justice Douglas. Going beyond that, we respectfully suggest that the majority has overlooked the distinctive position which Section 2 occupies in the Commission's administrative processes. Sharfman, in "Interstate Commerce Commission," Vol. III-B, at page 395, states:

"On the whole, conditions precedent or subsequent to the actual movement of traffic by rail—considerations of origin, destination, and use which do not affect the transportation task itself—are likely, if given weight, to provide an entering wedge for that pernicious sort of favoritism which it was a leading purpose of the Act to prevent. By standing staunchly for strict equality of treatment of like traffic under like conditions of carriage, the Commission contributed effectively to the attainment of this elementary objective of railroad regulation."

While, in many cases an unjustly discriminatory charge is equally an unduly prejudicial charge, nevertheless, Congress enacted these two sections and they should each be given the force and effect which Congress intended. Furthermore, in certain situations, which are particularly important here, relief can be secured under Section 2, although it might be difficult, if not impossible, to make out a case under Section 3(1). First, it is not necessary for a shipper to be in competition with another shipper in order to obtain relief under Section 2.⁶ However, such a competitive relation is essential under Sec-

⁶ Sharfman, "Interstate Commerce Commission," Vol. III-B, p. 378, n. 104.

tion 3(1).⁷ When the appellant ships to the Southeast, his competition with merchants shipping to the Texas ports relates only to the buying of cotton. There is no direct competitive relation in the actual shipment and sale of the cotton since it goes, in one case, to the domestic mills, and in the other case, beyond the ports for water movement to other consumers. Consequently, it is arguable that if appellant is not entitled to the equality of loading charges guaranteed him by Section 2, he will be unable to meet with the condition precedent as to competition necessary to relief under Section 3(1), even if the proof is otherwise adequate.

In the second place, carrier competition is a factual defense under Section 3(1) and not under Section 2, so that undue discrimination can be established in cases where the carriers have a defense against a charge of undue prejudice.

In the third place, in a proceeding involving the relation of the *total* charges, appellant would be foreclosed from relief because differences in the physical circumstances and conditions incident to the through carriage would automatically make Section 2 inapplicable, as a matter of law, and appellant would be foreclosed from relief under Section 3(1) because of a lack of common control by the same carrier or carriers of the aggregate charges. *Texas & Pacific Ry. v. United States, supra.*

Under these circumstances, appellant is entitled to rely on Section 2 as applied to the difference in loading charges considered independently of the line-haul rates, and the Court should be reluctant to give that section a construction which will withhold from appellant the right to equal terminal charges which Congress intended to confer. The fact that the circumstances and conditions

⁷ *Ibid.*, p. 559, n. 422; p. 529, n. 367.

which are relevant under Section 3(1) may, or may not, be such as to foreclose relief to the appellant thereunder, affords no logical reason for a failure to apply Section 2 according to its terms.

5. The majority opinion misconceives and misapplies the authorities in holding, that it is within the discretion of the Commission in a Section 2 case to consider or not, as it finds appropriate, the measure or the relation of the line-haul rates as a component part of the through charges, the aggregate of which is in part determined by the terminal charge which alone is in issue.

In the first place, this Court has overlooked the rule clearly stated in *Interstate Commerce Commission v. Delaware, L. & W. R. Co.*, 220 U. S. 235, 253-4, buttressed by a long line of English cases construing the Equality Clause in the English Act on which our Section 2 is modeled, to the effect that Section 2—

“did not allow carriers by railroad to make a difference in rates because of differences in circumstances arising either before the service of the carrier began or after it was terminated.”

as well as the guiding principle stated in *Interstate Commerce Commission v. B. & O. R. R. Co.*, 225 U. S. 326, 342—

“Once depart from the clear directness of what relates to the carriage only and we may let in considerations which may become a cover for preferences.”

In the latter case, this Court approved a refusal of the Commission to consider differences in the aggregate services which resulted from the fact that railway fuel moves as carrier freight beyond the destination to which consigned, while commercial fuel does not. That refusal was predicated on a concept of legal relevancy and not on administrative discretion.

In the second place, the Court has overlooked the sig-

nificance and effect of *Interstate Commerce Commission v. Stickney*, 215 U. S. 98, 105, 109, where this Court held that a terminal carrier is entitled to have the lawfulness of a separately stated terminal charge maintained by it determined independently of, and without merger with, line-haul charges maintained by other carriers. If such a separate carrier has an independent right to adjust its separate charge solely in the light of services rendered by it, consistency requires that it accept the obligation to treat all shippers equally in respect to that charge as maintained and applied independently of the line-haul rate, the latter being controlled by other carriers.

In the third place, the Commission cases cited on pages 5 and 6 of the majority opinion are not analogous to the instant case so as to support the rule stated.* Except for the *Archer-Daniels-Midland Co.* case, these cases all involved a claim of discrimination predicated on a difference in the absorption⁹ practices of a line-haul carrier. Those cases are distinguished on pages 7 to 10 of appellants' reply brief. To restate briefly: a complaint under Section 2 directed at a difference in absorption

* *Archer-Daniels-Midland Co. v. Alton R. Co.*, 246 I. C. C. 421, 428, 430; *Minneapolis Traffic Ass'n v. Chicago & N. W. Ry. Co.*, 241 I. C. C. 267, 220, 224; *Railroad Comm. of Wisconsin v. Ann Arbor R. Co.*, 177 I. C. C. 588, 592; *State Docks Commission v. Louisville & N. R. Co.*, 467 I. C. C. 112, 115-6; *Tide Water Oil Co. v. Director General*, 62 I. C. C. 226, 227; *Richmond Chamber of Commerce v. Seaboard Air Line Ry.*, 44 I. C. C. 455, 466.

⁹ In rate making, "absorption" is commonly used to denote the payment by one carrier of the charges of another carrier, the latter acting as the agent of the former. When used in the technical sense just stated, the term cannot be applied to the inclusion by a carrier of accessorial services under the line-haul rate maintained by the same carrier. Under the Commission's accounting regulations, absorptions are charged as deductions from revenue, while the cost of all services performed by a carrier which are included by it under rates maintained by it are charged to the appropriate operating expense primary accounts. 49 CFR 10.101.

practices is directed solely at the line-haul carrier and at the differences in the services which the latter includes within the line-haul rates maintained by it. The line-haul rate is constant, regardless of the absorption. If there is no absorption, a separate switching carrier collects its charge from the shipper. Where the charge is absorbed, the switching carrier is paid by the line-haul carrier which employs the switching line as its agent. Consequently, a Section 2 case involving switching absorptions goes to a quantity of the service under a particular line-haul rate, rather than to a difference in rates collected by the carrier complained of. Section 2 requires a consideration of the line-haul conditions because the complaint is actually directed to the line-haul rate. The Commission properly holds, as a matter of law, that Section 2 does not apply in such a case unless the total services are identical. However, the application of Section 2 in such a case is not considered to involve any administrative discretion, other than in determining whether or not the line-haul conditions are similar. Once that is determined, Section 2 applies or does not apply as a matter of law.

In the *Archer-Daniels-Midland Co.* case, the carriers charged 66 cents for installing a grain door but made no charge for furnishing a grain door in connection with services between terminals. Contemporaneously, they charged \$2.48 for *furnishing* and installing a grain door in a cross-town switching movement in a single terminal. The Commission held this did not result in a violation of Section 2 because of dissimilar circumstances and conditions, the line-haul rates contemplating the *furnishing* of the doors, although not their installation, while the cross-town switching rates did not cover the furnishing of the grain doors. That case would be like this one if the difference in charges had related to the installation service prior to the haul of the traffic. That, how-

ever, was not the difference at which the complaint was directed. The difference in issue was actually inherent in the extent of the services *between origin and destination* included within the rate for haulage, the doors being included in one case and not in the other. Since the services directly involved were an integral part of the haulage services, regardless of the charge therefor, the admitted difference in the whole of the haulage services took that case from under Section 2 as a matter of law.

In the fourth place, the majority has misunderstood and misapplied the Commission cases cited in footnote 5 on page 8 of the majority opinion.¹⁰ The error in which the majority has fallen is due in part to some looseness of expression on the part of the Commission, in part to the failure of the Court to note that the Commission has overruled certain of the cases cited, and in part to an admitted lack of consistency in the Commission's own decisions. (See Charles W. Berry, "Study of Proportional Rates," 10 I. C. C. Prac. Journal, March, 1943, pp. 545-607.)

The generally accepted rule in cases dealing with the lawfulness of proportional rates, under every section of the Act, was announced in *Cairo Board of Trade v. C., C. & St. L. Ry. Co.* (1917), 46 I. C. C. 343, 350-1, which overruled the *Stevens Grocer Co.* case, the latter being

¹⁰ *Stevens Grocer Co. v. St. Louis, I. M. & S. Ry.*, 42 I. C. C. 396, 397-8; *Cairo Association of Commerce v. Angelina & N. R. R. Co.*, 160 I. C. C. 604, 608-9; *Switching at Minneapolis*, 235 I. C. C. 405, 410; *Cairo Board of Trade v. Cleveland C. C. & St. L. Ry.*, 46 I. C. C. 343, 350-1; *Indianapolis Chamber of Commerce v. Cleveland, C. C. & St. L. Ry.*, 46 I. C. C. 547, 556; *Phoenix Utility Co. v. Southern Ry.*, 173 I. C. C. 500, 501-2 and cases cited; *Nebraska-Colorado Grain Producers Assn. v. C. B. & Q. R. Co.*, 243 I. C. C. 309, 311-13; *Fraser-Smith Co. v. Grand Trunk W. Ry.*, 185 I. C. C. 57, 62; *Atkinson-Milling Co. v. Chicago, M., St. P. & P. R. Co.*, 235 I. C. C. 391, 393-4; *Livestock to Eastern Destinations*, 156 I. C. C. 498, 509.

cited and relied upon by the majority of this Court. In the *Cairo* case an undivided Commission, speaking through Commissioner Meyer, said:

"The rule is stated in the *Stevens Grocer Co. Case* more broadly than it should be. In determining whether or not a complainant has been damaged [so as to be entitled to reparation] by the exaction of unreasonable or unduly preferential reshipping rates the total through charges paid from point of origin must be considered. But this does not hold true of a determination of the reasonableness or justness of the reshipping rate itself. * * * An excessive reshipping rate might produce a reasonable through charge in connection with an unduly low inbound rate and vice versa. It can not properly be argued that a proposal to increase unremunerative reshipping rates could be denied upon the ground that the through charge composed of an excessive inbound rate and the unremunerative reshipping rate is just and reasonable. The converse must also be true, namely, that shippers may not upon like grounds be denied relief from unreasonable or unduly prejudicial reshipping rates."

The rule of the *Cairo Board of Trade* case, which is analogous to the rule applicant seeks in this case, has been followed in a host of later cases, thirty-five of them being collected in an appendix to Mr. Berry's article.

There is a type of proportional rate case in which it is necessary to consider the aggregate charges. In such cases the proportional does not apply generally but is restricted to shipments from or to a particular point or territory of origin or destination, the measure of the particular charge being directly conditioned on the exact measure of the other components in the through rate. These are found almost exclusively in the grain adjustment where they are used so as to produce equal through rates via various gateways or rate break points. These are called "varying proportionals," and constitute the type con-

sidered by the Commission in *Fraser-Smith Co. v. Grand Trunk W. Ry.*, *supra*, and *Atkinson Milling Co. v. Chicago, M. St. P. & P. R. Co.*, *supra*. The Commission treated *Nebraska-Colorado Grain Producers Assn. v. C. B. & Q. R. Co.*, *supra*, as involving the same type of rates, since the factors there involved were directly related to the other components making up through rates on grain under the rate-break principle. The reason for considering the through rate in a case of varying proportionals was clearly explained in *Central Pennsylvania Coal Producers Association v. B. & O. R. Co.*, 196 I. C. C. 203, 235. However, when the separately stated charge is a component of the through rate by the happenstance of application to a through shipment, rather than because made interdependent with other components, the accepted rule is stated in the *Cairo Board of Trade* case, *supra*.

In the same footnote, the majority mistakenly cite *Livestock to Eastern Destinations*, 156 I.C.C. 498, 509, as holding, in an investigation and suspension proceeding under Section 15(7), that the Commission deems it proper to consider the effect of the proposed rate factor on the through-rate structure. As we read the case, what the Commission really did was to mention contentions predicated on a consideration of the through rates, at the same time rejecting them as a relevant circumstance in the case before it involving only a single component. In that case, a change in a western rate factor was protested on the ground that it would increase the through rates to the East, the protestants asserting the right to reasonable through rates not in excess of those presently in effect. As to that the Commission held (pp. 504-5):

... * * * This is an investigation and suspension proceeding and its scope is necessarily limited by the schedules under suspension. Although named in some of the tariffs containing these schedules, the carriers

which serve points in central, trunk-line, and New England territories, with unimportant exceptions, are not parties to the suspended schedules. The suspension of the operation of these schedules did not raise any issue which those carriers were called upon to meet, and the question of joint rates to points on the lines of those carriers is not properly before us. As between that and the question of the reasonableness and propriety of the proposed proportional rates, we are limited in this proceeding to consideration of the latter."

If the same rule of law had been applied here, appellant would have prevailed before the Commission.

The Commission also held in the case cited (p. 509) that its action must be restricted to the rates before it and that it was not empowered to require western carriers to make an adjustment of rate factors, separately maintained and controlled by them, so as to provide some particular relation with other rates or rate factors not in issue.

WHEREFORE, appellant respectfully prays a rehearing of the decision of this Court of May 3, 1943, so that the decree of the District Court may be reversed and the case remanded to that court with directions to enter the injunction prayed for.

Respectfully submitted,

LUTHER M. WALTER
JOHN S. BURCHMORE,
NUEL D. BELNAP,

Attorneys for Appellant.

I, NUEL D. BELNAP, counsel for appellant, certify the foregoing petition is presented in good faith, is true and correct, and is not filed for delay.

NUEL D. BELNAP.

May, 1943.

SUPREME COURT OF THE UNITED STATES.

No. 520.—OCTOBER TERM, 1942.

L. T. Barringer and Company,
Appellant,
vs.
The United States of America, Inter-
state Commerce Commission, At-
chison, Topeka and Santa Fe Rail-
way Company, et al.

Appeal from the District
Court of the United
States for the Western
District of Tennessee.

[May 3, 1943.]

Mr. Chief Justice STONE delivered the opinion of the Court.

This is a suit by appellant, a shipper of cotton over the lines of appellee railroads, brought under 28 U. S. C. § 41(28), to enjoin and set aside an order of the Interstate Commerce Commission. The District Court of three judges dismissed the complaint, and the case comes here on direct appeal pursuant to 28 U. S. C. § 47. The question is whether the Commission erred in refusing to set aside tariffs on cotton, filed by the five appellee railroads, as unjustly discriminatory and unduly prejudicial to shippers in violation of §§ 2 and 3(1) of the Interstate Commerce Act, 24 Stat. 379, 380; 49 U. S. C. §§ 2, 3(1).

From the report of the Commission, on which its order was based, 248 I. C. C. 643, the following facts appear. Appellees carry cotton from points in Oklahoma to ports on the Gulf of Mexico. Their lines also form relatively short parts of the through routes over which cotton moves from Oklahoma to points in the southeastern United States. During recent years carriers of cotton to the Gulf ports have been faced with serious truck competition. To meet it, successive rate reductions have been made. Until about ten years ago the only rates available on cotton were less-than-carload rates, since individual shipments of cotton are seldom, if ever, in carload quantities. As is customary on less-than-carload shipments, the cotton was loaded at the expense of the carrier.¹

¹Loading is customarily performed at the carrier's expense on less-than-carload freight. Loading Cotton in Oklahoma, 248 I. C. C. 643, 644, and at the shipper's expense on carload freight, Merchants' Warehouse Co. v. United

During 1932 and 1933 the carriers, in an effort to reduce rates and achieve operating economies, put in effect so-called carload rates for cotton which the Commission, after investigation, approved in *Cotton From and to Points in Southwest and Memphis*, 208 I. C. C. 677. Under these rates the cotton was typically collected in less-than-carload quantities at the ginning points, carried by rail for short distances to compressors, and after compression assembled in carload quantities for shipment to destination. The shipper paid the local, less-than-carload rate to the compress point, and the local rate from compress point to destination, but on the cotton's arrival at destination the carrier refunded the difference between the freight paid and the through, carload, rate from point of origin to destination. On these rates loading was at the shipper's expense; if the carrier performed the loading service a charge of 5½ cents a square bale was made, which was paid by a deduction from the refund allowed by the carrier on the transit settlement just referred to. This loading charge was stated separately in appellees' tariffs filed with the Commission, pursuant to § 6(1).

Despite the reduction in cost to shippers produced by the adoption of these schedules, truck competition continued to be a serious problem. In 1939 carriers of cotton from Texas points effected a farther rate reduction by eliminating the loading charge. The tariffs here under consideration, filed by appellees to be effective on June 11, 1941, similarly eliminate the loading charge for cotton moving from compress points in Oklahoma to certain ports on the Gulf of Mexico,² while retaining it on cotton moving to the Southeast.

Appellant buys cotton in Oklahoma for resale to mills in the Southeast. Under the proposed tariffs it must continue to pay the loading charge on cotton which it ships to the Southeast, while merchants who ship to the Gulf ports, and who compete with appellant in the purchase of cotton, are relieved of that charge. Contending that this situation would create an unjust discrimination under § 2, and would be unduly prejudicial under § 3(1),

States, 223 U. S. 501, 506; *Pennsylvania R. Co. v. Kittaning*, 253 U. S. 319, 323; *Loading and Unloading Car-Load Freight*, 101 I. C. C. 394, 396; *McCormick Warehouse Co. v. Pennsylvania R. Co.*, 148 I. C. C. 299, 300.

For discussions of loading practices on cotton in the Southwest see *Cotton Loading Provisions in the Southwest*, 220 I. C. C. 702; *Cotton Loading and Unloading in the Southwest*, 229 I. C. C. 649.

² Beaumont, Corpus Christi, Galveston, Houston, Orange, Port Arthur, and Texas City, Texas, and Lake Charles, Louisiana.

appellant filed a petition with the Commission under § 15(7) to suspend the proposed tariffs.

Division 3 of the Commission, after a hearing in which appellant participated, issued its report and order, refusing to set aside the proposed rates. It found, that truck competition had continued to increase during 1940, so as to justify appropriate efforts by the carriers to meet such competition; that the loading charge caused annoyance to shippers; that the cost of performing the loading service was in most cases nominal and its performance by the carrier would result in loading to maximum capacity, so that elimination of the charge was a suitable method of achieving a needed reduction in rates which were already low; that carriers in states further East opposed the extension into their territory of the practice of free loading, and the elimination by appellees of the loading charge on cotton moving into that territory; that the "rates to the Southeast are already lower relatively than they are to the Texas ports"; and that "there is no trucking of cotton from Oklahoma to the Southeast." Accordingly it found that the proposed elimination of the loading charge "is just and reasonable and not shown to be otherwise unlawful." Appellant's petition for reconsideration was denied by the full Commission, and the proposed rates, which had been suspended while under consideration by the Commission, became effective.

Appellant's principal contention is that in considering the validity of the proposed tariffs under § 2, the Commission could look only at the charge for the loading service and was not entitled to consider conditions relating to the through line-haul rates. Section 2 of the Act declares it to be an "unjust" and prohibited discrimination for any carrier "directly or indirectly, by any special rate, rebate . . . drawback or other device", to charge one person more or less than another for "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." It is undoubted that the loading service here involved is a transportation service to which § 2 applies. § 1(3)(a); *Merchants Warehouse Co. v. United States*, 283 U. S. 501, 511.

Section 2 is aimed at the prevention of favoritism among shippers. See Sharfman, *Interstate Commerce Commission*, vol. III-B, pp. 360-61. Where the transportation services are rendered under

³ The Commission pointed out that carriers were free to adopt free loading or not as they chose, and in the same proceeding approved an application of certain Texas carriers to reestablish the loading charge.

substantially similar conditions the section has been thought to prohibit any differentiation between shippers on the basis of their identity. *Interstate Commerce Commission v. Baltimore & Ohio R.*, 225 U. S. 326, 342; *Interstate Commerce Commission v. Delaware L. & W. R. R.*, 220 U. S. 235, 252, or on the basis of competitive conditions which may induce a carrier to offer a reduction in rate to one shipper while denying it to another similarly situated, *Wight v. United States*, 167 U. S. 512, 516-18; *Interstate Commerce Commission v. Alabama Midland Ry.*, 168 U. S. 144, 166. Compare *Seaboard Air Line Ry. v. United States*, 254 U. S. 57, 62. But differences in rates as between shippers are prohibited only where the "circumstances and conditions" attending the transportation service are "substantially similar". Whether those circumstances and conditions are sufficiently dissimilar to justify a difference in rates, or whether, on the other hand, the difference in rates constitutes an unjust discrimination because based primarily on considerations relating to the identity or competitive position of the particular shipper rather than to circumstances attending the transportation service, is a question of fact for the Commission's determination. Hence its conclusion that in view of all the relevant facts and circumstances a rate or practice either is or is not unjustly discriminatory within the meaning of § 2 of the Act will not be disturbed here unless we can say that its finding is unsupported by evidence or without rational basis, or rests on an erroneous construction of the statute. *Seaboard Air Line Ry. v. United States*, *supra*, 62; *Interstate Commerce Commission v. Delaware L. & W. R. R.*, *supra*, 251-2; *Louisville & N. R. Co. v. United States*, 282 U. S. 740, 758; *Merchants Warehouse Co. v. United States*, *supra*, 508; *Baltimore & Ohio R. Co. v. United States*, 305 U. S. 507, 524.

In considering the circumstances and conditions attending the transportation service the Commission was not required to ignore the fact that the loading charges, although separately stated in the tariffs, are in each case a component part of the total line-haul cost to the shipper and inseparable from it. All the carrier loading costs not compensated for by the loading charges, if any, to shippers, are necessarily absorbed by the carrier out of the line-haul charges which shippers pay. The loading charge is not paid until the line-haul is completed and the ultimate destination known, and then only by a reduction of the refund payable by the carrier on the transit settlement prescribed by the tariffs. And where cotton

moves on less-than-carload rates the cost of loading is absorbed by the carrier, although the loading services performed by the carrier are the same. In these circumstances the net effect, on the shipper's line-haul cost, of the remission by the tariff of any part of the loading charge, is precisely the same as though the like reduction were made in the line-haul tariff.

It has long been established by our decisions that differences in competitive conditions may justify a relatively lower line-haul charge over one line than another, and that it is for the Commission, not the courts, to say whether those differences are sufficient to show that a difference in rates established to meet those conditions is not an unjust discrimination or otherwise unlawful. *Texas & Pacific Ry. v. United States*, 289 U. S. 627, 636-7, and cases cited; *Manufacturers Ry. Co. v. United States*, 246 U. S. 457, 481; *United States v. Chicago Heights Trucking Co.*, 310 U. S. 344, 352-53; *Board of Trade of Kansas City v. United States*, 314 U. S. 534, 546. It follows that competitive conditions which would justify and render non-discriminatory a reduction in the line-haul tariff on a particular class of traffic, would likewise justify the reduction and render it non-discriminatory if made in the loading charge instead. Whether made in the one charge or the other, it enters into the total cost of the line haul to the shipper, regardless of whether the loading charge be separately stated or included in the line-haul tariff. Since the only effect on the shipper is in the difference in the line-haul charge and he is harmed no more by one method of effecting that difference than the other, any conditions attending the line haul which justify the one as non-discriminatory equally justify the other. *that*

This Court has held the Commission may consider the through line-haul rate in determining whether a related accessorial charge is just and reasonable under § 1 (5) (a). *Atchison, T. & S. F. Ry. v. United States*, 232 U. S. 199, 219-220. We find nothing in § 2 or in our decisions that precludes the Commission from similarly looking at the whole of the services rendered to different shippers to determine whether the conditions are such as to justify a difference in charges made for one component part of that whole. Nor has the Commission found such a limitation in the statute. *Archer-Daniels, Midland Co. v. Alton R. Co.*, 246 I. C. C. 421, 428, 430; *Minneapolis Traffic Ass'n v. Chicago & N. W. R. Co.*, 241 I. C. C. 207, 220, 224; *Railroad Comm. of Wisconsin v. Ann Arbor R. Co.*, 177 I. C. C. 588, 592; *State Docks Commission v. Louisville & N. R. Co.*, 167 I. C. C. 112, 115-116; *Tide Water Oil Co. v.*

Director-General, 62 I. C. C. 226, 227; *Richmond Chamber of Commerce v. Seaboard Air Line Ry.*, 44 I. C. C. 455, 466.*

Obviously there is nothing in this construction of § 2 which would preclude the Commission from setting aside a difference in a separately stated service charge which in fact operates to discriminate unjustly among shippers. We have repeatedly sustained a finding of the Commission that such a difference, based on a difference in identity of shippers or the ownership of the goods shipped, or on other circumstances irrelevant to the carrier service rendered, is an unjust discrimination to shippers. *Wight v. United States*, *supra*; *Interstate Commerce Commission v. Delaware, L. & W. R. R.*, *supra*; *Interstate Commerce Commission v. Baltimore & Ohio R. R.*, *supra*; *Seaboard Air Line Ry. Co. v. United States*, *supra*; *Louisville & W. R. Co. v. United States*, *supra*; *Merchants Warehouse Co. v. United States*, *supra*. The distinction between those cases and this is that here the difference in the service charge is made between through shippers over different routes, and is based on relevant differences in the "circumstances and conditions" of the total transportation services rendered by the carriers. It was within the competence of the Commission to find that this involved no unjust discrimination.

This is not to say that in every case where the differences in total transportation services rendered are such as would justify a greater charge to one than to another shipper, the difference in charge can at the carrier's option be made in the charge for an accessorial service such as the loading service here involved. But the decision whether the circumstances and conditions are such as to justify a difference in the accessorial charge, or rather to require that any adjustment be made in the line-haul charge, is one which the statute has left to the determination of the Commission, which Congress has entrusted with the power and duty of guarding against the prohibited favoritism. In the circumstances of this case we cannot set aside, as lacking in rational basis, the Commission's determination that the reduction in the line-haul cost to the shipper effected by remission of the loading charge did not result in an unjust discrimination.

* Insofar as *Birkett Mills v. Delaware, L. & W. R. Co.*, 123 I. C. C. 63, 65, is to the contrary, it appears to rest on a misinterpretation of the effect of our decision in *Central R. Co. of New Jersey v. United States*, 257 U. S. 247, 255. Moreover it does not appear that there were present in that case any circumstances justifying a difference in the charges for the total transportation services rendered.

It is no answer to this determination of the Commission to say that the rates here approved as non-discriminatory may be open to attack in a proceeding under § 13(1) to adjust the line-haul rates in which all connecting carriers who participate in the tariff are required to be parties by Rule II(c) of the Commission's 1936 Rules of Practice, or in a proceeding under § 15(3) to establish divisions of the through rates among the connecting carriers, "a matter which in no way concerns the shipper", *Louisville, N. R. R. v. Sloss-Sheffield Co.*, 269 U. S. 217, 234. Here the difference in loading charge is assailed by a shipper only, and on the grounds alone that it is unjustly discriminatory or unduly preferential. The discrimination or preference, if any, is caused by the carriers who perform in part the line-haul transportation service. The Commission has not undertaken to pass upon the validity of the line-haul rates, and it does not appear that appellant has asked it to do so. It has passed only on the question of discrimination or preference resulting from the remission of the loading charge. In doing so it has, as § 2 contemplates, looked at all the relevant circumstances and conditions, including the respective line-haul conditions, in order to ascertain whether the loading service and line hauls are made under substantially similar circumstances and conditions with respect to the particular discrimination charged. The Commission has found that they are not and that the difference in service charge is not unjustly discriminatory as to shippers.

Section 2 gives us no mandate, and none is to be implied from the statutory scheme, to reverse that finding and to declare that the difference in service charge constitutes an unjust discrimination merely because the total through cost, of which that charge is a component, may be open to attack in a proceeding bringing the through rate into question. See *Manufacturers Ry. v. United States*, *supra*, 479, 481. But unless we are to say that § 2 precludes the Commission from considering facts which are relevant to the issue of discrimination which it must decide, we perceive no other ground upon which their consideration can be deemed forbidden.⁵ In the present proceeding the only question

⁵ The Commission has not interpreted its Rule II(c) as precluding it from looking at relevant conditions and circumstances relating to the through rate although only part of that rate is brought in issue in the proceeding before it and other carriers participating in the through rate have not been joined as parties. Where the attack is on a component part of the through haul cost on grounds other than its effect on the through rate structure, there is no occasion for joining the other carriers participating in the through rate.

in issue is whether the proposed elimination of the loading charge is unjustly discriminatory or unduly prejudicial; nothing in the Commission's order or its Rules of Procedure forecloses attack on the line-haul rates in an appropriate proceeding on any ground which the statute authorizes.

Nor do we find anything in § 6(1) which precludes the Commission from looking ~~at~~ the entire through rate. That section merely requires carriers to file with the Commission all rates and charges established by them, and to "state separately all terminal charges, storage charges, icing charges and all other charges which the Commission may require, all privileges or facilities granted or allowed." Appellees have complied with its requirement that the loading charge, and the exceptions to it created by the

The Commission has frequently held that a complainant who attacks a component part of a through rate as unreasonable or prejudicial because of its effect on the through rate structure, must join all carriers participating in the through rate. *Stevens Grocer Co. v. St. Louis, E. M. & S. Ry.*, 42 I. C. C. 396, 397-8; *cf. Cairo Association of Commerce v. Angelina & N. R. R. Co.*, 160 I. C. C. 604, 608-9; *Switching at Minneapolis*, 235 I. C. C. 405, 410. But it has also held that a shipper who attacks the validity of a component part of a through rate, viewed separately, and does not put in issue the validity of the through rate as a whole, may do so without joining any carrier other than the one responsible for the particular component under attack. *Cairo Board of Trade v. Cleveland C. C. & St. L. Ry.*, 46 I. C. C. 343, 350-51; *Indianapolis Chamber of Commerce v. Cleveland C. C. & St. L. Ry.*, 46 I. C. C. 546, 556; *Phoenix Utility Co. v. Southern Ry.*, 173 I. C. C. 500, 501-2; and cases cited; see *Atchison, T. & S. F. Ry. Co. v. United States*, 279 U. S. 768, 776-7. In the latter type of case, where the complaint puts in issue only the validity of one part of a through rate, the Commission has held that the carrier is not precluded from introducing evidence to show that the rate attacked should not be set aside as unlawful, in view of its relationship to the whole through rate. *Nebraska Colorado Grain Producers Ass'n. v. C. B. & Q. R. R.*, 243 I. C. C. 309, 311-13; *Fraser-Smith Co. v. Grand Trunk W. Ry.*, 185 I. C. C. 57, 62; *Atkinson Milling Co. v. Chicago, M. St. P. & P. Ry.*, 235 I. C. C. 391, 393-4.

Nebraska Colorado Grain Producers Ass'n. v. C. B. & Q. R. R., *supra*, involved an attack on a component part of a through rate as unreasonable and preferential. In denying complainant's motions to exclude evidence introduced by the carrier relating to the through rate structure of which the rate under attack was a part, the Commission said: "The right to attack one factor of a combination through rate without putting the through rate in issue presents an entirely different question from that raised by these motions. While we have consistently held, in the cases referred to by complainant and supporting interveners, that where reparation is not claimed, one factor of a combination through rate may be assailed independently of the other factor or factors or even of the through rate itself, this does not mean that we may not look at the through situation." The Commission further pointed out that, "Although we have authority to find separate components of through rates unlawful, we must, in doing so, give careful consideration to the effect of such a finding on the through rates." 243 I. C. C. at 312, 313. Similarly in investigation and suspension proceedings under § 15(7), where necessarily the only rate in issue is that proposed and under suspension, the Commission has deemed it proper to consider the effect of the proposed rate on the through rate structure. *Livestock to Eastern Destinations*, 156 I. C. C. 494, 509.

present tariffs, be separately posted. We have not construed § 6(1), which is designed to insure publicity of rates, *Kansas City Southern Ry. Co. v. Albers*, 223 U. S. 573, 596-7, as precluding a carrier from performing an accessorial service free of charge provided no violation of any other section of the Act is shown. See *Interstate Commerce Comm. v. Stickney*, 215 U. S. 98, 105. Nor does it preclude the Commission from considering the validity of the imposition or elimination of such a separately-stated charge in the light of its relationship to the through rate. Compare *Atchison, Topeka, & Santa Fe v. United States*, *supra*.

What we have said of § 2 suffices also to dispose of the objection based on § 3(1). That section makes it unlawful to give an "undue or unreasonable preference or advantage" to, or impose an "undue or unreasonable prejudice or disadvantage" on, any "person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory or any particular description of traffic." It differs from § 2 in that it may be availed of not only by shippers but by any other person who has been or may be injured by an inequality of rates.

But the facts which we hold sufficient to justify the Commission's finding that the elimination of the loading charge does not result in an unjust discrimination, are sufficient also to justify its finding that the elimination of that charge does not create an undue preference. Compare *Clover Splint Coal Co. v. Louisville & N. R. Co.*, 197 I. C. C. 276, 277. We have frequently sustained the Commission's determination, in cases arising under § 3, that differences in competitive conditions justify lower through rates over one route than over another. *Texas and Pacific Ry. v. United States*, *supra*; *Texas and Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 205-217; *Interstate Commerce Comm. v. Chicago G. W. Ry. Co.*, 209 U. S. 108, 119, 121-2.

We cannot say here, any more than under § 2, that the Commission could not regard the truck competition to the Southwest, and the relative rate structures disclosed in its report, as sufficient to warrant the difference in the cost of the through haul which results from the elimination of the loading charge by the present tariffs.

Affirmed.

SUPREME COURT OF THE UNITED STATES.

No. 520.—OCTOBER TERM, 1942.

L. T. Barringer and Company, Appellant, vs. The United States of America, Inter- state Commerce Commission, At- chison, Topeka and Santa Fe Rail- way Company, et al.	}	Appeal from the District Court of the United States for the Western District of Tennessee.
---	---	---

[May 3, 1943.]

Mr. Justice DOUGLAS, dissenting.

Sec. 2 of the Act makes it unlawful for any common carrier "by any special rate, rebate, drawback, or other device" to receive from any person "a greater or less compensation for any service rendered" in the "transportation" of passengers or property than it receives from any other person for doing for him "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." Loading is clearly a "service rendered" in the "transportation" of property¹ within the meaning of § 2. See *Merchants Warehouse Co. v. United States*, 283 U. S. 501. The practice which is now held to be free from the charge of unlawful discrimination under § 2 is the practice of loading cotton free for certain shippers who ship to one destination and exacting a loading charge from others who ship from the same points, but to a different destination. That is to say, free loading of cotton is allowed shippers who ship cotton from Oklahoma to the Texas Gulf ports; a loading charge² is required from those who ship cotton from the identical places in Oklahoma to the Southeast.

The Commission in its report justified that discrimination on the following considerations: (1) there is no trucking off cot-

¹ Sec. 1(3)(a) defines "transportation" so as to include "all services in connection with the receipt, delivery . . . and handling of property transported."

² The loading charge is 3.5¢ per square bale of cotton and 2.75¢ per round bale. This loading rate is carried separately in the tariffs as is required by § 6(1) of the Act. See Tariff Circular 20 (I. C. C. 1933) Rule 10(a).

tion between points in Oklahoma and the Southeast while there is considerable truck competition in the movement of cotton from Oklahoma to the Texas Gulf ports; (2) carload rates on cotton from Oklahoma to the Southeast are on a relatively lower basis than carload rates from the same origins to the Texas Gulf ports; and (3) rates from points in Oklahoma both to the Southeast and to the Texas Gulf ports are depressed. The Commission in its report made no specific reference to § 2. It now seeks to sustain its order on the ground that the conditions surrounding the respective line-hauls justified the carriers in absorbing the loading charge in the line-haul rates for one shipper but not for another. It endeavors to avoid the issue of discrimination by contending that § 2 as a matter of law has no application to the present situation. Its argument is that § 2 does not apply where the line-hauls are not over the same line, for the same distance, and to the same destination. That contention is based on *Wight v. United States*, 167 U. S. 512, which the Commission claims to have followed consistently.³

I disagree with that construction of § 2. The *Wight* case involved a rebate by one road of a part of the rate between Cincinnati and Pittsburgh and was made on account of drayage at the Pittsburgh end. The Court held that § 2 was violated, saying that that section "prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor." 167 U. S. p. 518. It does not follow that § 2 applies ONLY where those identical conditions exist. Thus in *Birkett Mills v. Delaware, L. & W. R. Co.*, 123 I. C. C. 63, the Commission had before it a complaint of millers, grain dealers, and elevator companies in New York respecting different transit charges on ex-lake and all-rail traffic, the transit charges being separately established. It held that "as the differing transit charges are for the same transit services at the same points by the same carriers, unjust discrimination under section 2 of the act exists." p. 65. No reference was made to line-haul conditions, though the relation between transit priv-

³ *Richmond Chamber of Commerce v. Seaboard Air Line Railway*, 44 I. C. C. 455, 464-466; *Pacific Lumber Co. v. N. W. P. R. Co.*, 51 I. C. C. 738, 760; *Tide Water Oil Co. v. Director General*, 62 I. C. C. 226, 227; *Standard Oil Co. v. Director General*, 87 I. C. C. 214; *Bunker Hill & Sullivan M. & C. Co. v. N. P. Ry. Co.*, 129 I. C. C. 242, 246; *Cane Sugar from Wisconsin to Minnesota*, 203 I. C. C. 373, 376; *Miller Waste Mills, Inc. v. Chicago, N., St. P. & P. R. Co.*, 226 I. C. C. 451, 453.

ileges and rate structures is intimate. *Atchison, T. & S. F. Ry. Co. v. United States*, 279 U. S. 768; *Board of Trade v. United States*, 314 U. S. 534. And the principles of the *Birkett Mills* case have been applied by the Commission to other situations where the haul was not over the same line, for the same distance, and to the same destination. *Suffern Grain Co. v. Illinois Central R. Co.*, 22 I. C. C. 178, 183-184; *Washington D. C. Store-Door Delivery*, 27 I. C. C. 347.

It was stated in *Interstate Commerce Commission v. Baltimore & Ohio R. Co.*, 145 U. S. 263, 284, that "any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge." Those inequalities of conditions may relate to the circumstances of carriage. But the fact that different rates for carriage are warranted does not necessarily mean that different rates for identical accessorial services in connection with the carriage are justified. The Court stated in *Merchants Warehouse Co. v. United States*, *supra*, p. 511, that "Section 2 forbids the carrier to discriminate by way of allowances for transportation services given to one, in connection with the delivery of freight at his place of business, which it denies to another in like situation." And see *Baltimore & Ohio R. Co. v. United States*, 305 U. S. 507, 524. By the same token there is a forbidden discrimination, in case of an accessorial service such as loading, where different rates are charged different shippers though the physical services rendered during the loading are alike.

But it is said in reply that there is nothing in § 2 which limits the phrase "under substantially similar circumstances and conditions" to the circumstances surrounding the particular accessorial service in question; and that it is a factual issue for the informed judgment of the Commission whether line-haul conditions are to be considered in determining the validity of separate charges for services such as loading. The answer, however, seems clear. The service of loading, like the transit service in the *Birkett Mills* case, is identical whether the property is going south or south-east, whether its journey is long or short, whether it is transported by one carrier or another. A carrier which is loading in Oklahoma one car of cotton for a southeastern mill, and another car of cotton for a Gulf port is certainly performing a "like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." A carrier which is loading two cars at the same time, on the same

siding, with the same commodity is indeed performing the same service under the same circumstances and conditions. To charge the first shipper for loading his car and to load the other one free would be to impair the rule of equality which § 2 was designed to inaugurate. *Interstate Commerce Commission v. Delaware, L. & W. R. Co.*, 226 U. S. 235; *Louisville & N. R. Co. v. United States*, 282 U. S. 740, 749-750. The result in the present case is a gross discrimination against shippers to the Southeast.⁴

There may be cases of special charges for special services where the validity of the rate under § 2 is dependent on whether the line-haul conditions are the same.⁵ Yet § 2, though primarily related to the line-haul, is not restricted to it. *Merchants Warehouse Co. v. United States*, *supra*. At least where the service in question is purely accessorial, § 2 is applicable though the line-hauls are not over the same line, for the same distance and to the same destination. Where § 2 is applicable, competitive factors (such as those on which the Commission relied) are no justification for the discrimination. *Interstate Commerce Commission v. Alabama Midland Ry. Co.*, 168 U. S. 144, 166; *Interstate Commerce Commission v. Baltimore & Ohio R. Co.*, 225 U. S. 326, 342; *Seaboard Air Line Ry. Co. v. United States*, 254 U. S. 57, 62; *Absorption of Loading Charge*, 161 I. C. C. 389, 391; *Allowance for Driving Horses*, 227 I. C. C. 387, 389. The justification under § 2 for "unequal rates must rest in the facts of carriage and not in the financial interests of the carrier." Sharfman, *The Interstate Commerce Commission*, Pt. 3, Vol. B, p. 371.

There are, of course, occasions when a consideration of the line-haul rate in relation to the charge for an accessorial service is proper. That is the case where a rate has been challenged under § 1(5)(a) as not being "just and reasonable". In that event it is wholly proper to determine whether elements of cost not provided in the separate rate are, in fact included, in the line-haul rate. *Atchison, T. & S. P. Ry. Co. v. United States*, 232 U. S. 199, 219-220; *Perishable Freight Investigation*, 56 I. C. C. 449, 461-465; *Alton & S. R. R. v. United States*, 49 F. 2d 414, 417-428. But the issues framed by § 1(5)(a) are larger than

⁴ None of the carriers to the Southeast serves the Gulf ports. Appellee carriers have only a short part of the line-haul on cotton from Oklahoma to the Southeast.

⁵ The Commission apparently has so treated the problem of absorption of switching charges. See *Tide Water Oil Co. v. Director General*, 62 I. C. C. 226; *Restriction of Kansas City Switching District*, 146 I. C. C. 438, 440. And see *Seaboard Air Line Ry. Co. v. United States*, 254 U. S. 57. Cf. *United States v. American Tin Plate Co.*, 301 U. S. 402.

the more limited ones under § 2. And though the rate is just and reasonable under § 1, it may nevertheless create an unjust discrimination under § 2. *Interstate Commerce Commission v. Baltimore & Ohio R. Co.*, 145 U. S. 263, 277; *American Express Co. v. Caldwell*, 244 U. S. 617, 624; *United States v. Illinois Central R. Co.*, 263 U. S. 515, 524.

But it is said that the loading charge is a component part of the total line-haul charge; that competitive conditions would justify a reduction in the line-haul tariff; and that a shipper is affected no more by an increase or decrease in one than in the other. It is therefore argued that changes in the charge for this accessorial service may be treated the same as if the line-haul tariff were in issue. That argument, however, results in this: an adjustment in charges for accessorial services such as loading is utilized as an indirect method of adjusting line-haul rates. That is not permitted under this statutory system. Although charges for services such as loading are a part of the total line-haul charge, they must be separately stated in the tariffs. § 6(1); Rule 10(a), *supra*, nt. 2. This proceeding put in issue not the line-haul tariff but the separately stated charge for loading, since the amended tariff made no change in the former. To allow this proceeding to be used to adjust indirectly the line-haul tariff is to circumvent the Act. The difference between the removal of a discrimination and the adjustment or fixing of rates has long been recognized. *St. Louis S. W. Ry. Co. v. United States*, 245 U. S. 136, 145. The present line-haul rate is a through or joint rate in which carriers other than the appellee roads participate. Those other carriers are not parties to this proceeding; nor does it appear that they have consented to any adjustment of the line-haul rates. Congress has prescribed in § 15(3) how those rates may be adjusted. It may be done only after a "full hearing", which means that all other carriers who are parties to the tariff must be joined. *Stevens Grocer Co. v. St. Louis, I. M. & S. Ry. Co.*, 42 I. C. C. 396, 398; *McDavitt Bros. v. St. Louis, B. & M. Ry. Co.*, 43 I. C. C. 695; *United States v. Abilene & So. Ry. Co.*, 265 U. S. 274, 283, nt. 6; Rules of Practice (I. C. C. 1936), Rule II(c) and (d). And the Commission may then adjust the through rates or joint rates either with or without the consent of the carriers. *St. Louis S. W. Ry. Co. v. United States*, *supra*. On the other hand, the loading charge, like the transit privilege involved in *Central R. Co. v. United States*, 257 U. S. 247, 255, 259, is a

tariff for which other carriers participating in the through or joint rates are not necessarily responsible. In short, Congress has prescribed the procedure for obtaining adjustments of line-haul rates. That method is different from the one provided for adjusting a separate tariff of the kind we have here. We should not allow the procedure for readjusting line-haul rates to be circumvented through the rebate route. Cf. *Central R. Co. v. United States*, *supra*.

The determination by the Commission on the question of discrimination under § 2 is ordinarily a question of fact. *Nashville, C. & St. L. Ry. Co. v. Tennessee*, 262 U. S. 318, 322. Its findings on that issue are entitled to great weight (*Seaboard Air Line Ry. Co. v. United States*, *supra*) and will be given the respect which expert judgment on the intricacies of rate structures deserves. But disregard of the statutory standards is another matter. *Central R. Co. v. United States*, *supra*.

Since I would rest the reversal of the judgment below on § 2, it is not necessary for me to reach the issues raised under § 3.

Mr. Justice ROBERTS, Mr. Justice BLACK and Mr. Justice REED join in this dissent.